TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, [redacted] 1924.

No. [redacted]

TWIN FALLS SALMON RIVER LAND AND WATER COMPANY, COMMONWEALTH TRUST COMPANY OF PITTSBURGH, TRUSTEE, &c., ET AL., APPELLANTS,

vs.

A. B. CALDWELL, W. F. MIKESELL, V. E. MORGAN, ET AL., &c.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

FILED [redacted], 1924.

(28,592)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1922.

No. 217.

TWIN FALLS SALMON RIVER LAND AND WATER COMPANY, COMMONWEALTH TRUST COMPANY OF PITTSBURGH, TRUSTEE, &c., ET AL., APPELLANTS,

vs.

A. E. CALDWELL, W. F. MIKESELL, V. E. MORGAN, ET AL., &c.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

INDEX.

	Original.	Print.
Caption	1	1
Record from the district court of the United States for the district of Idaho	1	1
Amended bill of complaint	1	1
Plaintiffs' Exhibit A—State contract with Twin Falls Salmon River Land and Water Company	42	19
Plaintiffs' Exhibit C—Settlers' contract (omitted in printing)	62	
Motion to dismiss (omitted in printing)	72	
Amended answer and cross-bill to amended bill of complaint	74	30
Answer of Salmon River Canal Company to amended bill of complaint (omitted in printing)	99	
Answer of Commonwealth Trust Company, trustee	105	43

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., MAY 22, 1922.

	Original.	Print
Answer of A. C. Robinson.....(omitted in printing)..	123	
Statement of evidence under equity rule 75 (omitted in printing)	125	
Testimony of E. B. Darlington..(omitted in printing)..	136	
Testimony of H. M. Sims.....(omitted in printing)..	144	
Plaintiffs' Exhibit 17—Circular letter of Twin Falls Salmon River Land & Water Co. (omitted in printing).....	147	
Testimony of A. E. Caldwell....(omitted in printing)..	165	
W. F. Mikesell...(omitted in printing)..	167	
George Clyde Baldwin (omitted in printing)	173	
Plaintiffs' Exhibit 22—Monthly run-off of Salmon Falls Creek below lands of Utah Construction Co.....(omitted in printing)..	178	
Testimony of William J. Trueblood (omitted in printing)	184	
Testimony of E. B. Darlington (recalled) (omitted in printing).....	190	
Defendants' Exhibit 3—Loss in reservoir in acre feet.....(omitted in printing)..	195	
Defendants' Exhibit 4—Reservoir losses per submerged acre.....(omitted in printing)..	197	
Plaintiffs' Exhibit 23—Written answer of witness containing figures on run-off, storage, losses, etc. (omitted in printing).....	208	
Testimony of R. J. Newell.....(omitted in printing)..	213	
Defendants' Exhibit 12—Rating curve for Salmon River.....(omitted in printing)..	214	
Defendants' Exhibit 13—Monthly run-off of Salmon Creek below lands of Utah Construction Company.....(omitted in printing)..	215	
Testimony of R. W. Faris.....(omitted in printing)..	216	
G. M. Hall.....(omitted in printing)..	218	
E. B. Darlington (recalled) (omitted in printing)	219	
William Wayman....(omitted in printing)	224	
Colloquy between court and counsel (omitted in printing)	225	
Order settling statement of evidence (omitted in printing)	278	
Decision, Deitrich, J.....(omitted in printing)..	279	
Notice of motion to introduce further proof (omitted in printing)	307	
Affidavit of S. H. Hays on application for rehearing and reopening of case.....(omitted in printing)..	308	
Exhibit A—Form of contract between State of Idaho and irrigation companies approved in 1899.....(omitted in printing)..	319	

	Original.	Print.
Exhibit B—Copy of paragraph nine of contract between State of Idaho and American Falls Canal & Power Co. (omitted in printing)	335	
C—Copy of paragraph nine of contract between State of Idaho and Mullins Canal and Reservoir Co. (omitted in printing)	335	
D—Contract between State board of land commissioners and Twin Falls Land and Water Company..(omitted in printing)..	337	
E—Agreement between State of Idaho and Twin Falls North Side Land and Water Company.....(omitted in printing)..	358	
F—Report of State engineer (omitted in printing)	388	
Memorandum decision on application to reopen case (omitted in printing)	391	
Interlocutory decree.....(omitted in printing)..	393	
Assignment of errors.....(" " ")..	395	
Petition for appeal.....(" " ")..	401	
Order allowing appeal.....(" " ")..	402	
Bond on appeal.....(" " ")..	403	
Citation and service.....(" " ")..	405	
Return to record.....(" " ")..	407	
Clerk's certificate.....(" " ")..	407	
Bill of exceptions.....(" " ")..	1	
Testimony of C. H. Posten.....(" " ")..	7	
John G. Boren...(" " ")..	9	
Joseph Boren....(" " ")..	10	
W. M. Worthington (omitted in printing)	12	
W. F. Holt.....(omitted in printing)..	15	
J. P. Holmbram..(omitted in printing)..	16	
C. J. Griffith.....(" " ")..	19	
J. S. Welch.....(" " ")..	26	
Irrigation tables.....(" " ")..	32	
Testimony of J. C. Wheelan...(" " ")..	44	
Testimony of W. G. Sloane....(" " ")..	63	
Defendants' Exhibit No. 19—Map of Kuhn irrigation projects.....(omitted in printing)..	69	
Testimony of Wm. Wayman....(omitted in printing)..	76	
Testimony of E. B. Darlington..(omitted in printing)..	87	
Defendants' Exhibit No. 20—Inflow into reservoir (omitted in printing)	88	
Defendants' Exhibit No. 21—Distributing system (omitted in printing)	89	
Defendants' Exhibit No. 22—Profile and water table.....(omitted in printing)..	91	
Testimony of C. C. Thom.....(omitted in printing)..	92	

	Original.	Print.
Defendants' Exhibit No. 23—Crop table (omitted in printing)	98	
Defendants' Exhibit No. 24—Table of soil solutions (omitted in printing)	99	
Defendants' Exhibit No. 25—Relation of quantity of water to bacterial activity (omitted in printing)	103	
Defendants' Exhibit No. 26—Table of plant food solutions.....(omitted in printing)..	105	
Defendants' Exhibit No. 27—Alfalfa table (omitted in printing)	107	
Defendants' Exhibit No. 28—Corn table (omitted in printing)	110	
Defendants' Exhibit No. 29—Potato table (omitted in printing)	111	
Defendants' Exhbit No. 30—Table of water capacity of soil.....(omitted in printing)..	114	
Defendants' Exhibit No. 31—Alkali condition of land.....(omitted in printing)..	119	
Defendants' Exhibit No. 32—Duty of water (omitted in printing)	131	
Defendants' Exhibit No. 33—Water capacity of soil.....(omitted in printing)..	133	
Testimony of E. P. Senior.....(omitted in printing)..	148	
Testimony of John Krall.....(omitted in printing)..	153	
Order settling bill of exceptions....(omitted in printing)	162	
Return to record.....(omitted in printing)..	163	
Clerk's certificate.....(omitted in printing..	163	
Order upon application for appointment of receiver	9	55
Bond pursuant to order	12	56
Amendment to answer of Twin Falls Salmon River Land & Water Co	15	58
Amendment to answer of Commonwealth Trust Co	19	60
Supplemental answer of defendants	24	62
Statement of evidence at second trial	31	66
Testimony of G. M. Hall	34	67
J. C. Porterfield	48	73
Ray M. Beauchamp (omitted in printing)	66	
T. J. Douglas....(omitted in printing)..	77	
F. A. Wilkie	80	82
Plaintiffs' Exhibit No. 1—Letter of State engineer to State board of land commissioners	87	85
Testimony of J. E. Pohlman....(omitted in printing)..	100	
Robert Rayl.....(" " ")..	101	
W. F. Mikesell..(" " ")..	104	
A. E. Caldwell...(" " ")..	105	
Ray M. Beauchamp (recalled) (omitted in printing)	109	

	Original.	Print.
Plaintiffs' Exhibit No. 2—Minutes of meeting of State board of land commissioners, October 15, 1917	113	94
Plaintiffs' Exhibit No. 3—Minutes of meeting of State board of land commissioners, March 5, 1919	118	97
Testimony of C. E. Holderman (omitted in printing)	124	
A. E. Robinson (omitted in printing)	124	
C. E. Holderman (recalled) (omitted in printing)	125	
Thos. A. Sanderson (omitted in printing)	126	
J. W. Bouton (omitted in printing)	128	
Fred W. Berger (" " ")	129	
Fred Weddle (" " ")	131	
Steffen Bos (" " ")	133	
Arrett Bos (" " ")	133	
R. N. Reed (" " ")	136	
W. W. Johnson (" " ")	137	
John Smith (" " ")	141	
C. M. Dryden (" " ")	143	
Don H. Bark (" " ")	144	
Water table of Salmon project (omitted in printing)	180	
Testimony of Roswald A. Carter (omitted in printing)	182	
William McDonald (omitted in printing)	183	
A. D. Furrow (omitted in printing)	184	
A. E. Larsen (omitted in printing)	184	
Henry Korthuis (omitted in printing)	185	
J. E. Henstock (omitted in printing)	186	
G. E. Harlan (" " ")	187	
Paul Vantill (" " ")	188	
J. M. Pierce (" " ")	188	
T. C. Craig (" " ")	189	
J. A. Palmer (" " ")	190	
William M. Pereboom (omitted in printing)	191	
Frank Caudle (omitted in printing)	191	
R. H. Hartley (" " ")	193	
Newton Galley (" " ")	193	
L. C. Callen (" " ")	194	
D. W. Pratt (" " ")	196	
A. E. Larsen (recalled) (omitted in printing)	196	
W. S. Starr (omitted in printing)	197	
Hugh Dodd (" " ")	199	
E. A. Beck (" " ")	199	
Jesse A. Ghiffiths (" " ")	200	
E. B. Darlington	200	100

	Original.	Print.
Testimony of J. C. Porterfield (recalled)	206	102
Defendants' Exhibit 1—Comparative statement of reservoir action by years, Salmon River Canal Company, Ltd	206	102
Testimony of G. M. Hall (recalled)	226	112
Plaintiffs' Exhibit A—Notice of allotment and delivery of water	227	113
Plaintiffs' Exhibit B—Notice to water users by Salmon River Canal Company, Ltd	228	113
Defendants' Exhibit B—Report on check basin	232	115
Defendants' Exhibit C—Telegram of September 4, 1918	238	119
Defendants' Exhibit D—Answer of September 11, 1918	238	119
Testimony of E. B. Darlington (recalled)	239	120
Defendants' Exhibit G—Protest, March 12, 1918	241	121
Defendants' Exhibit H—Report of State engineer, August 12, 1907 (omitted in printing)	243	
Testimony of A. J. Wiley (stipulated) (omitted in printing)	248	
Testimony of G. M. Hall (omitted in printing)	250	
Decision	252	122
Decision on check basin expense	275	132
Decree	281	135
Order to file statement	285	137
Petition for appeal (omitted in printing)	287	
Order allowing appeal and fixing bond (omitted in printing)	289	
Assignment of errors (omitted in printing)	289	
Bond on appeal (" " ")	296	
Stipulation (" " ")	301	
Citation and service (" " ")	305	
Præcipe for transcript (" " ")	307	
Return to record (" " ")	310	
Clerk's certificate (" " ")	310	
Order of submission in circuit court of appeals for the ninth circuit	2	139
Stipulation that patent has issued	3	140
Order filing opinion and decree	5	141
Opinion, Morrow, J	6	141
Decree	28	153
Order filing opinion on petition for rehearing	29	154
Opinion on petition for rehearing, Morrow, J	30	154
Decree	39	159
Order denying petition for rehearing	40	159
Petition for appeal	41	160
Assignment of errors	44	161
Order allowing appeal	50	164
Bond on appeal	51	164
Clerk's certificate	56	167
Citation and service	57	168
Stipulation as to printing parts of record	61	169

1–7 In the District Court of the United States for the District of Idaho, Southern Division.

In Equity.

No. 494.

A. E. CALDWELL, W. F. MIKESELL, V. E. MORGAN, J. E. POHLMAN, W. C. Pond, James W. Beauchamp, Carl Washburn, and Harold M. Sims, in Their Own Behalf and in Behalf of All Persons Similarly Situated with Them, Complainants,

vs.

TWIN FALLS SALMON RIVER LAND & WATER COMPANY, a Corporation; Salmon River Canal Company, Limited, a Corporation; John M. Haines, W. L. Gifford, Grace Sheperd, Joseph H. Peterson, and Fred L. Huston, constituting the State Board of Land Commissioners of the State of Idaho; Commonwealth Trust Company of Pittsburgh, Trustee, and A. C. Robinson, Defendants.

Amended Bill of Complaint.

To the Honorable Frank S. Dietrich, Judge of the District Court of the United States for the District of Idaho, Southern Division:

The complainants above named file this, their Amended Bill of Complaint herein, and for their cause of action respectfully show to your Honor:

I.

That the complainants A. E. Caldwell, W. F. Mikesell, V.
8 E. Morgan, J. E. Pohlman, W. C. Pond, James W. Beauchamp, Carl Washburn and Harold M. Sims, were at the time of the commencement of this action, and still are, residents and citizens of the State of Idaho.

II.

That the defendant Twin Falls Salmon River Land & Water Company, was at all the times in this complaint mentioned and still is a corporation organized and existing under and by virtue of the laws and statutes of the State of Delaware and a citizen of said State, and as such corporation engaged in the building, construction and maintenance of a certain irrigation system and the sale of water rights therein for the reclamation of lands in the County of Twin Falls, State of Idaho, including the lands of the complainants hereinafter described.

III.

That the defendant, Salmon River Canal Company, Limited, was at the time of the commencement of this action and still is a corporation organized and existing under and by virtue of the laws and statutes of the State of Idaho and is a citizen of said State and is the corporation designated and provided for in the contract between the State of Idaho and the defendant Twin Falls Salmon River Land & Water Company, and intended by such contract to operate the irrigation works to be constructed by the defendant, the Twin Falls Salmon River Land & Water Company.

9 IV.

That the defendants John M. Haines, W. L. Gifford, Grace Sheperd, Joseph H. Peterson and Fred L. Huston, are respectively the legally elected, qualified and acting Governor, Secretary of State, Superintendent of Public Instruction, Attorney General and Auditor of the State of Idaho, and they are and ever since on or about the first day of January, A. D. 1913, have been and do constitute the State Board of Land Commissioners of the State of Idaho, and each and every one of the defendants in this paragraph of the Bill of Complaint named were, at the time of the commencement of this action, and still are residents and citizens of the State of Idaho.

V.

That the defendant Commonwealth Trust Company of Pittsburgh, was at the time of the commencement of this action, and still is, a corporation organized and existing under the laws of the State of Pennsylvania, and a citizen of said State.

VI.

That the defendant A. C. Robinson, was at the time of the commencement of this action and still is a resident and citizen of the State of Pennsylvania.

VII.

That on or about the 30th day of April, A. D. 1908, the defendant Twin Falls Salmon River Land & Water Company, made and entered into a contract with the State of Idaho, the latter acting by and through the State Board of Land Commissioners of said
10 State, under and by virtue of the terms of an Act of Congress approved August 18th, 1894, "An Act making appropriation for sundry civil expenses for the year ending June 20th, 1895, and for other purposes," commonly known as the "Carey Act," and the Statutes and Laws of the State of Idaho accepting and giving force and effect thereto, under and by virtue of the terms and conditions of said contract, the said defendant Twin Falls Salmon River Land &

Water Company agreed to construct a certain irrigation system in the State of Idaho, consisting of a large storage reservoir in Twin Falls County, in said State, conserving and storing the waters of Salmon River in said State; and for the purpose of diverting and applying said waters so stored and conserved to a beneficial use, the said defendant Twin Falls Salmon River Land & Water Company agreed to construct numerous canals, laterals, head gates, weirs, aqueducts and other irrigation appliances for the purpose of conveying and distributing the said water to and over a large tract of land of the public domain within Twin Falls County, Idaho, including the lands hereinafter described, all of which said lands were segregated and set apart by the State of Idaho under the provisions of the said Carey Act, and the said irrigation system was to be constructed for the purpose of making water available to irrigate, reclaim and cultivate the lands hereinabove referred to, and in consideration of the premises, it was agreed by the said contract above referred to that the defendant Twin Falls Salmon River Land
11 & Water Company, should have the exclusive sale of shares or water rights in said canal for said land, and the State of Idaho agreed not to permit any person to enter upon or become the owner of any such land unless he was the holder of one share or water right for every acre entered; and it was understood and agreed that after the completion of said irrigation works, the said defendant Twin Falls Salmon River Land & Water Company should convey said reservoir and canal system to a corporation to be organized under the laws of the State of Idaho to be known and called the "Salmon River Canal Company, Limited," but that all of the stock in said corporation was to be held, voted and controlled by the said defendant Twin Falls Salmon River Land & Water Company until the holder of a share or water right in said system should pay at least thirty-five per cent of the purchase price of such share or water right; that a copy of the said contract so made and entered into between the State of Idaho and the said defendant Twin Falls Salmon River Land & Water Company, is hereto attached marked Exhibit "A" and made a part of this complaint, and shall hereinafter be referred to as the "State Contract."

VIII.

That it was understood and agreed by and between the defendant Twin Falls Salmon River Land & Water Company and the State of Idaho, acting through the State Board of Land Commissioners of said State, in and by the agreement and contract commonly
12 called herein the State Contract, that the Twin Falls Salmon River Land & Water Company in no case should have the right to sell water rights or shares in said irrigation system hereinbefore referred to or in the Salmon River Canal Company, Limited, a corporation, to be formed as provided for in said State Contract, in excess of the appropriation of water for the irrigation and reclamation under said Carey Act; that the said segregation is commonly known as the "Salmon River Segregation" and the plat of the land

embraced in said segregation is hereto attached, marked Exhibit "B" and made a part of this complaint.

IX.

That on or about the 1st day of June, A. D. 1908, the complainants, A. E. Caldwell, by himself or his predecessor in interest, made entry with the said State Board of Land Commissioners for the following described tract of land situated and being in Twin Falls County, Idaho, to-wit: The South Half (S. ½) of the Southwest Quarter (S. W. ¼) of Section Three (3); Northeast Quarter (N. E. ¼) of the Southwest Quarter (S. W. ¼) of Section Three (3); Southeast Quarter (S. E. ¼) of the Southeast Quarter (S. E. ¼) of Section Four (4), all in Township Fourteen (14), South of Range Sixteen (16), E. B. M., and thereupon, and at said time, for a valuable consideration, purchased from the Twin Falls Salmon River Land & Water Company, one hundred and sixty (160) shares or water rights in said irrigation works, and to be represented by an equal number of shares of stock in the defendant, Salmon
13 River Canal Company, Limited, and then and there and at said time, entered into an agreement or agreements in writing with the defendant, the Twin Falls Salmon River Land & Water Company, for such purposes; that the said contract is herein referred to as the "Settlers Contract" and the copy of the same is annexed hereto, marked Exhibit "C" and made a part of this complaint.

X.

That the other complainants herein, and various other settlers upon said tract hereinbefore referred to, at various and divers times between on or about the 30th day of April, A. D. 1908, and on or about the 30th day of June, A. D. 1908, made entries either by themselves or their predecessors in interest similar to the entry made by the complainant A. E. Caldwell, for various tracts of land under said Salmon River Segregation, all lying in Twin Falls County, Idaho; such entries being fully described on complainants' Exhibit "B" herein, and the list of names of entrymen and their predecessors in interest and number of shares or water rights held by such entrymen attached to said Exhibit "B," to all of which reference is hereby made for the date of entry and description of the various tracts so entered and number of shares or water rights held by such entrymen, and that at said times above stated the complainants other than the complainant A. E. Caldwell, or their predecessors in interest and all of the settlers upon said tract, made and entered into con-
14 tracts similar to the one entered into by the complainant A. E. Caldwell, or his predecessor in interest, and similar in form and substance to the contract called Settlers Contract herein, marked complainants' Exhibit "C," and at said time and times purchased from the defendant Twin Falls Salmon River Land & Water Company, shares or water rights in said irrigation works and to be

represented by an equal number of shares of the stock in the defendant Salmon River Canal Company, Limited, and for the number of such shares of each of said complainants other than the complainant A. E. Caldwell, and all settlers upon said tract, these complainants refer to their Exhibit "B" which fully sets out the number of shares or water rights so purchased by such complainants or predecessors in interest and the other settlers from the defendant Twin Falls Salmon River Land & Water Company under the terms and conditions hereinabove stated.

XI.

That on or about the first day of June, A. D. 1908, the defendant Twin Falls Salmon River Land & Water Company, sold to divers persons who at that time held entries of an equal number of acres of land of said Salmon River Segregation about Seventy-five Thousand (75,000) shares or water rights in the irrigation works hereinbefore referred to for the irrigation of about Seventy-five Thousand (75,000) acres of land on said segregation and issued to such persons contracts similar in form and in substance to the contract herein referred to as the Settlers Contract, and attached hereto and
15 marked Exhibit "C." and that practically all of such contracts are now outstanding and in full force and effect, and that the complainants herein and all settlers on said Salmon Tract whose names appear upon complainants' Exhibit "B" hereto attached, are now holders of such settlers contracts, either as original entrymen and contractors, or by direct or mesne conveyance, and each and all of these complainants and other settlers whose names appear upon complainants' Exhibit "B" hereto attached, hold rights in the said irrigation system hereinbefore referred to as provided for and contemplated by said contracts.

XII.

That it was understood and agreed and contemplated by the terms of said State Contract, hereinbefore referred to, that each share or water right sold by the defendant Twin Falls Salmon River Land & Water Company, should represent a carrying capacity in said canal sufficient to deliver water at the rate of one one-hundredth of one cubic foot of water per acre per second of time for each share or water right sold and should also represent a proportionate interest in said canal and irrigation works, together with all rights and franchises therein, based upon the number of shares finally sold in said canal, and that in no case should water rights or shares be dedicated to any lands in said segregation or sold beyond the carrying capacity of the canal, or in excess of the appropriation of water therefor, and under and by the terms and conditions of the Settlers
16 Contract herein described, the defendant Twin Falls Salmon River Land and Water Company covenanted and agreed that the owner of a share or water right in said irrigation system hereinbefore mentioned, shall be entitled to receive one one-hun-

dredth of a cubic foot of water per acre per second of time for the lands described in said contract.

XIII.

That the appropriation provided for by said State Contract for the irrigation works and system hereinbefore referred to, consists of the normal flow of water of the Salmon River, together with the drainage thereof and none other; that the normal flow of water of said Salmon River during the irrigation season is very small and that said irrigation works is dependent entirely upon the amount of flood water stored, saved and conserved by the said Salmon River dam; that the said dam loses a great deal of water by seepage and evaporation, the exact amount of such loss these complainants do not know, but that the amount of water so lost is and will continue to be very great; that a great deal of water is lost in transportation from the said dam to the various farm units, the exact amount of which these complainants do not know, but the same is and will continue to be very great; that the amount of the available supply of water for use on the several land entries hereinbefore referred to, after deducting the loss which does and will continue to occur on account of the matters aforesaid is inadequate to irrigate the acreage entered upon under water con-
17 tracts sold and will not exceed fifty thousand (50,000) acre feet, and these complainants allege that at no time can it be reasonably or safely determined that more than fifty thousand (50,000) acre feet will be available for the uses of water right holders in said irrigation works delivered at a distance of one-half mile from each quarter section of land under said segregation.

XIV.

That the land of the complainants herein and all of the settlers on said Salmon Tract and included within the said segregation, is dry and arid in character and requires the artificial use of water thereon before crops of any kind or character can be raised, and that in order for the settlers on said tract to comply with the provisions of the said Carey Act and to irrigate and reclaim said land or to raise ordinary agricultural crops thereon, at least one-half miner's inch per acre continuous flow throughout the entire irrigation season, or at least two and three-fourths acre feet of water per acre, if delivered by periods of rotation as the needs of crops demand, is, and will continue to be necessary; said amount of water to be delivered within one-half mile of the respective land entries herein, and that such amount of water above stated, is, and will continue to be necessary even though the most skillful, efficient and beneficial methods of use and conservation be used and any less amount will be wholly insufficient to raise ordinary agricultural crops, and will not enable
the complainants and settlers upon said tract to comply with
18 the said Carey Act regarding a permanent water supply to reclaim said land, or to enable them to farm or cultivate their

said land profitably, and that unless the complainants and all settlers upon said Salmon Tract are able to secure the said amount of water for their land a great deal of such land will remain idle and unproductive, and the owner and holders thereof will suffer great and irreparable injury and damage.

XV.

That it was provided for and contemplated by the said State Contract, and the said Settlers Contracts, that an ample supply of water was and would be provided and actually furnished through the said irrigation works, to be delivered one-half mile from each quarter section of land in said segregation and sufficient in amount, time and manner of delivery to irrigate each acre of land upon which entries were made, for which shares or water rights were purchased as aforesaid in the usual, customary and ordinary manner among irrigation farmers, and to enable the owners and holders of said land to raise the ordinary, usual and profitable crops thereon, and to reclaim, cultivate and irrigate the same, and sufficient in amount, time and manner of delivery to thoroughly and properly irrigate, reclaim and cultivate each acre of said land, so as to comply with the said Carey Act and the Desert Land Laws of the United States and the Laws of the State of Idaho, and it was also provided for and contemplated by the said State Contract and the Settlers Contracts,
19 that the water right purchased by the complainants and other settlers on said tract per share or acre, was, and would be a right to receive one one-hundredth of a cubit foot of water per acre per second of time, equal to one-half miners' inch, for each acre of land irrigated, by a continous flow during the entire irrigation season from April 1st to November 1st of each year, or an equal and proportionate amount if delivered by rotation or by periods of time and in no case less than necessary to thoroughly irrigate and reclaim it as required by law and to enable the owner or holder of such land to raise ordinary and usual agricultural crops in the usual, ordinary and customary manner among farmers and irrigators, using good and reasonable husbandry; that one-half miner's inch per acre continuous flow is equal to about four and sixteen one-hundredths (4.16) acre feet per acre.

XVI.

That at and prior to the time of the making of the Settlers Contracts herein, it was represented to complainants and other purchasers of water rights or shares in said irrigation system by the defendant Twin Falls Salmon River Land & Water Company, that ample water was available to supply the rights of these complainants and all of the settlers on the said system, and that the complainants and a large number of settlers on said tract, relying upon such representations, made as aforesaid, and believing them to be true, cleared their lands or a large portion thereof, of sage and other brush, and

have planted such land with grasses, trees and other crops, all
20 of which are now growing upon said land, and needing artificial use of water, and without which, such crops will be injured and destroyed; that the complainants herein and a large number of settlers upon said tract, actually reside upon their respective land entries with their families and have so resided thereon for a long period of time, and are engaged and have been engaged in the cultivation of their respective lands, and there is now under cultivation in said segregation approximately thirty thousand (30,000) acres of land, all of which will demand and require the use of water during each irrigation season.

XVII.

That the defendant Twin Falls Salmon River Land & Water Company, has failed, neglected and refused and still fails, neglects and refuses to comply with the terms and conditions of the State Contract herein set out, in that, it has failed, neglected and refused and still fails, neglects and refuses to so construct its irrigation system as to make water available, ample and sufficient in quantity to furnish these complainants and other settlers upon said tract with the amount of water contracted to be furnished, and the said defendant Twin Falls Salmon River Land & Water Company, in violation of its contract with the State of Idaho, herein referred to as the State Contract, sold large number of water contracts or shares in said irrigation system, by the terms of which it undertook to furnish to such water contract holders a great amount of water far in excess of
the appropriation of water made by the defendant, or assigned
21 to it and especially referred to in the said State Contract, and these complainants allege and aver that the said Twin Falls Salmon River Land & Water Company has sold and delivered large amount of water from its reservoir system to persons and corporations other than actual settlers and contract holders upon said segregation, though having an insufficient supply, and the defendant Twin Falls Salmon River Land & Water Company has sold, and delivered and still sells and delivers from the irrigation system and reservoir herein referred to, large amount of water to persons and corporations other than settlers upon said Salmon Tract, all of which is contrary to the terms and conditions, and expressly in violation of said contract.

XVIII.

That the said defendant Twin Falls Salmon River Land & Water Company has failed, neglected and refused to comply with the terms and conditions of the said State Contract and the Settlers Contract herein referred to, in that it has failed, neglected and refused to supply ample and sufficient supply of water to these complainants and other settlers upon said tract, and has failed, neglected and refused to supply any amount of water in excess of about three-fourths acre feet per acre, and complainants aver that approximately three-fourths acre feet of water per acre is the only amount now available

for the use of all land in said segregation, and that the defendant Twin Falls Salmon River Land & Water Company, represents
22 and alleges that no other or further supply of water can be obtained from any source.

XIX.

That heretofore, and before the commencement of this action, these complainants and various other settlers upon said tract have made repeated demands upon the defendants John M. Haines, W. L. Gifford, Grace Sheperd, Joseph H. Peterson and Fred L. Huston, composing the State Board of Land Commissioners of the State of Idaho, to take such steps as necessary to compel the defendant Twin Falls Salmon River Land & Water Company, to comply with the terms and conditions of the said State Contract and to secure additional supply of water for said irrigation works, if possible, and if not possible, to reduce the acreage and contracts so that the total number of acres of land in said segregation should not exceed the amount of water available from said irrigation works; such water to be furnished and delivered under the terms of said State Contract and Settlers Contracts as aforesaid, but that the said State Board of Land Commissioners have failed and refused to take any steps or institute any action to bring about the results above stated, and the complainants and other settlers upon said tract have, prior to the commencement of this action, demanded that the said State Board of Land Commissioners take such action as is necessary under the laws of the State of Idaho to have the State Contract herein referred to forfeited as provided by law, or that steps be taken in court
23 to protect the interests of the complainants and other settlers upon said tract, but that such State Board of Land Commissioners have failed and refused and still fail and refuse to comply with such terms, or to take any steps whatever.

XX.

That patent for the land in said segregation has not issued from said United States to the State of Idaho, or to the settlers upon said tract, and the Department of the Interior is now withholding its decision for the issuance of such patents pending proof that the said land has been reclaimed within the contemplation of the provisions of the Carey Act, and has heretofore notified the State Land Board of the State of Idaho that the acreage in said segregation must be reduced because of insufficiency of water.

XXI.

That unless there is additional water made available and supplied to the land in said segregation, so as to furnish each acre with the amount of water hereinbefore specified and necessary, or, if such amount of water can not be made available, there be canceled enough water contracts to reduce the acreage having appurtenant water

rights to a point equal to the water supply, all of the complainants and other contract holders will suffer great and irreparable injury; that if each contract holder entitled to receive water is furnished only the proportionate amount of water now available, the entire segregation will be spotted with uncultivated areas or areas not properly cultivated because of insufficient water supply.

24

XXII.

That under and by virtue of the terms and conditions of the State Contract and the Settlers Contracts, and because of the failure on the part of the defendant, Twin Falls Salmon River Land & Water Company, to comply with the terms and conditions of said State Contract and the said Settlers Contracts, the balance due from these complainants and all settlers on said tract and all water contract holders was intended to be and does constitute a trust fund for the purpose of carrying out the terms and conditions of the said State Contract and the said Settlers Contracts and the purposes of the said Carey Act, and particularly to supply entrymen and contract holders with an ample and sufficient supply of water in a substantial ditch as hereinbefore mentioned; that there is now due from these complainants and other contract holders under said project, as it now exists, a sum equal to about Thirty-seven ($37.00) Dollars per acre, or a total of about Two Million Seven Hundred and Seventy-five Thousand ($2,775,000.00) Dollars; that if said tract be cut down to Thirty Thousand (30,000) acres there is and would be due about One Million One Hundred and Ten Thousand ($1,110,000.00) Dollars.

XXIII.

That during all the times since the incorporation of the defendant Salmon River Canal Company, Limited, and since the defendant Twin Falls Salmon River Land & Water Company, has notified settlers under its system that water was available for deliv-

25 ery, the said defendant Twin Falls Salmon River Land & Water Company through the defendant Salmon River Canal Company, Limited, has collected large sums of money from water contract holders under said system, including these complainants, ostensibly for the purpose of applying the same on account of and for maintenance charges, but in reality such sums and a great portion thereof were used in payment of excessive and illegal salaries and expenses of the officers, employees and attorneys of the defendant Twin Falls Salmon River Land & Water Company and the said defendant Twin Falls Salmon River Land & Water Company through said Salmon River Canal Company, Limited, at all times hereinabove stated, collected such alleged maintenance charges from all water contract holders upon said Salmon Tract although only a portion of the water contracted to be delivered was in fact delivered; that said defendant Twin Falls Salmon River Land & Water Company, fraudulently applied such maintenance charges so collected as aforesaid, in paying excessive and illegal salaries of employees

and attorneys and in paying exorbitant rent for buildings and in purchase of equipments for its own use and benefit, and for the use and benefit of its kindred projects and not for the use and benefit of the said Salmon River Canal Company, Limited.

XXIV.

That the defendant, the Twin Falls Salmon River Land & Water Company, is wholly insolvent and unable to respond in dam-
26 ages to these complainants and other holders of contracts on said tract, and unless the several and total amounts due from complainants and other contract holders be treated as a trust fund to carry out the terms and conditions of said State Contract and the said Settlers' Contracts, these complainants and all contract holders under said segregation will be without adequate remedy and will suffer great and irreparable loss and injury, and the said irrigation system will be a total failure and the said segregation and no part thereof will be entitled to patent from the United States.

XXV.

Complainants further allege and aver that they do not know positively whether or not it is practicable or feasible to secure an additional supply of water for the said segregation, but these complainants have been informed and believe, and therefore allege the fact to be, that by the expenditure of a great deal less than the amount now due from the complainants and all contract holders on said tract, a sufficient supply of water can be secured to irrigate and reclaim the tract, but if sufficient supply of water can not be secured, the said irrigation project can not be made a success unless a tract of land not to exceed Thirty Thousand (30,000) acres in extent to be set apart as land subject to water rights and all other lands on the said segregations be released and declared without a water right therein.

XXVI.

That the defendants Twin Falls Salmon River Land & Water Company and Salmon River Canal Company, Limited, are
27 in the actual control and operation of said system of irrigation works, and have refused and still refuse to recognize any rights of priority to the available water in said irrigation works based upon actual settlement or improvement or otherwise, and threaten to deliver water to all contract holders regardless of available supply; that unless the relative rights of all entrymen are fixed by a proper order of decree of this Court, the amount of acreage under cultivation will be so great that water will not be sufficient to irrigate the same, but only a small portion thereof, and great confusion, trouble and injury will result to all persons holding water rights in said system, as well as a multiplicity of suits prosecuted by such persons so interested to secure or protect their rights therein.

XXVII.

That the defendant, Salmon River Canal Company, Limited, is in only nominal control of said system; but that the same is under the dominion of the defendant Twin Falls Salmon River Land & Water Company, and will continue to be under the control and dominion of said Twin Falls Salmon River Land & Water Company, for a number of years to come; that the defendant Twin Falls Salmon River Land & Water Company does, and will control for a number of years to come and vote nearly all of the outstanding stock of said Salmon River Canal Company, Limited, under the power contained in the State Contract hereinbefore referred to; that the said Twin Falls Salmon River Land & Water Company elected
28 and selected the present Board of Directors of said Salmon River Canal Company, Limited, and all the officers thereof, and the officers of said Salmon River Canal Company, Limited, are the agents of the defendant Twin Falls Salmon River Land & Water Company; that the interests of these complainants and all settlers on said Salmon Tract and owners and holders of said contracts in said irrigation works are adverse to the interests of the Twin Falls Salmon River Land & Water Company, and that the said last named company has refused and still refuses to take any steps to protect the interests of the Salmon River Canal Company, Limited, in the matters herein set out, and these complainants are compelled to institute this action, not only in their own behalf and for their own benefit, but in behalf of and for the benefit of all settlers and water contract holders upon said tract and for the benefit of said defendant Salmon River Canal Company, Limited; that by reason of the premises, it would be useless to demand and ask the defendant Salmon River Canal Company, Limited, to institute and prosecute this action.

XXVIII.

That the defendant Twin Falls Salmon River Land & Water Company, through the defendant Salmon River Canal Company, Limited, controls the distribution of water in the irrigation works herein referred to to consumers; that the said Twin Falls Salmon River Land & Water Company and the said Salmon River Canal Company, Limited, have refused and still refuse to supply com-
29 plainants and other contract holders upon said contract the water as contemplated by said State Contract and Settlers' Contracts, fraudulently pretending that the water as heretofore supplied is ample for the acreage entered, and the said defendants Twin Falls Salmon River Land & Water Company and Salmon River Canal Company, Limited, have refused to deliver water in the quantities contemplated by said contracts and as required, but in fact delivered water to such settlers, including these complainants, in a very much less amount; that unless this Court, during the pendency of this action appoint a receiver or receivers, and take possession of said irrigation works and operate the same for the

benefit of those entitled to water therefrom, the said defendant Twin Falls Salmon River Land & Water Company will continue to oppress these complainants and the other settlers upon said tract, and such conduct can only result in a multiplicity of suits; that the said defendant Twin Falls Salmon River Land & Water Company, and the defendant Salmon River Canal Company, Limited, because it is under the control and dominion of the said defendant Twin Falls Salmon River Land & Water Company, have refused and still refuses to adopt a reasonable or proper system of delivery, or one required by the condition of the crops, and have refused and still refuses and will continue to refuse to recognize the rights of the complainants and others settlers upon said tract, or permit such water contract holders to have a voice in determining when water should be delivered, or to receive the amount of water con-
30 tracted to be delivered; that the said defendants Twin Falls Salmon River Land & Water Company and said Salmon River Canal Company, Limited, have adopted and do adopt a system of delivery by periods, but have not delivered and will not deliver an ample supply of water during such period, or on demand, or as the needs of the crops require; that the result of such methods and system of delivery as aforesaid, has been to cause hardship, annoyance and loss of crops; that to continue the same will produce great loss and damage and numerous claims for set-offs and reimbursements from the several amounts due from settlers to said trust fund and greatly affect the said trust fund and the collection thereof; that unless the said settlers upon said tract can receive water as agreed in their contracts, and as provided for in said State Contract, they, and each of them will refuse to pay towards said trust fund the amount due from them under and by virtue of the terms of their respective contracts; that the collection of said trust fund by a Receiver or Receivers can not be effectually accomplished unless all matters connected with said contracts, including the operation of said irrigation works, is taken under the control of this court through its Receiver.

XXIX.

That heretofore, and before the commencement of this action, and on or about the first day of June, A. D. 1908, and long time prior to the construction and completion of the irrigation works herein-
before referred to, and prior to the time that any water was
31 made available to contract holders upon said Salmon Tract, the defendant Twin Falls Salmon River Land & Water Company, made, executed and delivered a pretended deed of trust to the defendant American Trust & Savings Bank, Trustees, by the terms of which said deed of trust, the said defendant Twin Falls Salmon River Land & Water Company pretended and attempted to create a lien upon all dams, reservoirs, canals, ditches, laterals, head gates, flumes and the entire irrigation system of the said Twin Falls Salmon River Land & Water Company, together with all lands, rights of way, easements, privileges and franchises for same, and all appli-

ances and power connected therewith, then owned or thereafter acquired, and also all notes, contracts and mortgages then owned or which may thereafter be acquired by said Twin Falls Salmon River Land & Water Company in consideration of sale of water rights, and covenanted and agreed under and by virtue of the terms and conditions of said deed of trust to assign in writing all contracts for water rights in said irrigation system, and complainants aver that the said Twin Falls Salmon River Land & Water Company, did, prior to the commencement of this action, assign practically each and all water contracts it made with settlers to said American Trust & Savings Bank; that the said deed of trust attempted to create a lien for the sum of Four Million ($4,000,000.00) Dollars to secure bonds issued or to be issued by the defendant Twin Falls Salmon River Land & Water Company, and the said defendant the
32 American Trust & Savings Bank, thereupon, and on or about said time, accepted said trust for the uses and purposes therein set out; that the said Deed of Trust was filed for record on August 22nd, A. D. 1908, in the office of the County Recorder of Twin Falls County, Idaho, and recorded in Book 5 of Mortgages at pages 302 to 325 inclusive, and the same is now of record in the office of said County Recorder and purports to be a lien on said irrigation system of the defendant Twin Falls Salmon River Land & Water Company and upon all of the contracts of these complainants and all other settlers and contract holders upon said tract with the Twin Falls Salmon River Land & Water Company; that complainants refer to Book 5 of Mortgages of Twin Falls County, Idaho, pages 302 to 325 inclusive, for a copy of said Deed of Trust, and by such reference make said record and copy of said Deed of Trust a part of this Bill as Exhibit "D," with the same force and effect as if the same were here in full set out and attached hereto.

XXX.

That thereafter and on or about the 8th day of October, A. D. 1914, the said American Trust & Savings Bank, Trustee, duly tendered its resignation as such Trustee, and thereupon, and at said time, delivered and conveyed to the defendant, Commonwealth Trust Company of Pittsburgh, all the rights, liens and property it held under and by virtue of the Trust Deed referred to in paragraph XXIX of this Amended Bill, and on or about the 9th day of
33 October, A. D. 1914, the defendant Twin Falls Salmon River Land & Water Company, appointed the said Commonwealth Trust Company of Pittsburgh as Trustee under said trust deed to act in place and stead of the said American Trust & Savings Bank, and the said Commonwealth Trust Company of Pittsburgh duly accepted such trusteeship on the 9th day of October, A. D. 1914; that the resignation of said American Trust & Savings Bank, the original trustee under the trust deed herein referred to, was duly filed for record in the office of the County Recorder of Twin Falls County, Idaho, on the 19th day of October, A. D. 1914, and recorded in Book 2 of Miscellaneous Records at page 367, and these

complainants refer to said record, and by such reference make the same a part of this Bill with the same force and effect as if the same were here fully set out; that the appointment of the defendant Commonwealth Trust Company of Pittsburgh as Trustee in place and stead of said American Trust & Savings Bank, the original Trustee mentioned in said trust deed, was duly fild for record and recorded in the office of the Recorder of Twin Falls County, Idaho, on the 19th day of October, A. D. 1914, in Book 2 of Miscellaneous Records at page 369, and these complainants refer to said record, and by such reference make the same a part of this Bill with the same force and effect as if it were here fully set out; that the acceptance of the trusteeship under said Trust Deed by the said Commonwealth Trust Company of Pittsburgh was duly filed for record and recorded in the office of the Recorder of Twin Falls County,
34 Idaho, on the 19th day of October, A. D. 1914, in Book 2 of Miscellaneous Records at pages 371 and 372, and these complainants refer to such records, and by such reference make the same a part of this Bill with the same force and effect as if the same were here fully and at length set out.

XXXI.

That by reason of the matters and things set out in this Bill of Complaint and by reason of the fact that the defendant Twin Falls Salmon River Land & Water Company, has failed, neglected and refused to comply with the terms and conditions of the said State Contract hereinbefore referred to and the said Settlers Contracts and by reason of the fact that the Twin Falls Salmon River Land & Water Company has failed, neglected and refused, and still fails, neglects and refuses to so complete its said irrigation system as to comply with the terms and conditions of the State Contract and Settlers Contracts, and to furnish and make available the water required by it to be furnished to the contract holders with it in accordance with the terms and conditions of said State Contract and said Settlers Contracts, the pretended lien of said deed of trust, if any, is subject and subordinate to the rights of the purchasers of shares or water rights in said irrigation system, and the grantee in said deed of trust took said deed of trust, subject to the conditions herein set out, and by reason of the premises, the pretended lien of said deed of trust is null, void and of no effect as against these
35 complainants and other water contract holders in said irrigation system.

XXXII.

That thereafter, and on or about the 14th day of October, A. D. 1914, the defendant, Twin Falls Salmon River Land & Water Company, made a pretended assignment to the defendant A. C. Robinson by the terms of which it sought to sell, transfer, assign and set over unto the defendant A. C. Robinson, contracts for the supply of water by the Twin Falls Salmon River Land & Water Com-

pany made with various persons; that such pretended assignment set forth the names of the persons with whom such contract was made, the face value of the amount due under such contracts, the number of such contracts and the number or letter of the public records of Twin Falls County wherein the said contracts were recorded; that the total amount of the unpaid balance upon such water contracts assigned as aforesaid were set out in said assignment at One Hundred Ninety-four Thousand Three Hundred Ninety-seven and 48/100 ($194,397.48) Dollars; that the said pretended assignment above referred to was filed for record and recorded in the office of the County Recorder of Twin Falls County, Idaho, on the 19th day of October, A. D. 1914, in Book 3 of Assignment of Water Contracts at page 1, and these complainants refer to said records above mentioned and by such reference make the same a part of this Bill with the same force and effect as if the same were here fully and at length set out.

36

XXXIII.

That the pretended assignments referred to in the preceding paragraph of this Bill were made wholly without any valuable consideration, and these complainants are informed and believe and allege the fact to be that the defendant A. C. Robinson threatens to collect the amounts due from the water contract holders described in said assignment, and the said A. C. Robinson will collect said amounts or the greater part thereof unless restrained from doing so by an order or decree of this Court.

XXXIV.

That the questions sought to be determined in this action are of common and general interest to all settlers upon said Salmon Tract and all water contract holders similarly situated with the complainants herein, and they constitute a class so numerous as to make it impracticable to bring them all before this court, and by reason thereof, these complainants bring this action in their own behalf and on behalf of all other settlers and water contract holders upon said tract similarly situated with them.

XXXV.

That by reason of the premises and the matters and things set out in this bill of complaint, these complainants and all other settlers upon said Salmon Tract have not a plain, speedy or adequate remedy at law, and unless this Court grant them the relief herein sought, they and each of them will suffer great and irreparable wrong and injury and will be wholly remediless.

37 Wherefore, complainants pray the judgment of this Honorable Court:

a. That it be adjudged and decreed that the amount due from each and every complainant and from each and every settler and contract holder of water rights in said irrigation system herein referred to entitled to receive water under the order of this Court, constitute a trust fund for the purpose of carrying out the objects and purposes of the said State Contract and the Settlers Contracts set out in this complaint, and particularly to furnish each and every acre of land having water rights appurtenant to it from said irrigation works with an ample and sufficient supply of water as contemplated by said State Contract and said Settlers Contracts and not less than one-half miner's inch per acre continuous flow or two and three-fourths acre feet per acre if delivered by periods upon demand of the several owners thereof, measured and delivered not more than one-half mile from each quarter section of land on the said irrigation system, and that the trust so declared and created be prior and superior to the rights or claims of any and all persons whatsoever; that the pretended lien created or attempted to be created by the defendant Twin Falls Salmon River Land & Water Company under and by virtue of the deed of trust made by it to the American Trust & Savings Bank, Trustee, and now claimed by the substituted Trustee, the defendant Commonwealth Trust Company of Pittsburgh, and described herein as complainants' Exhibit "D" be canceled and declared to be void and of no effect and held
38 for naught and declared to be subject and subordinate to the rights of the complainants and other water contract holders in said irrigation system as in this complaint set out, and the said defendant Commonwealth Trust Company of Pittsburgh, Trustee, or any holder of bonds issued by the defendant Twin Falls Salmon River Land & Water Company, be restrained and enjoined from collecting any sum or sums of money due from contract holders on the said irrigation system upon such contracts either as principal or interest, and that the defendant A. C. Robinson be restrained and enjoined from collecting any monies upon the water contracts assigned to him by the defendant Twin Falls Salmon River Land & Water Company as hereinbefore set out, and that such pretended assignment of such water contracts be declared to be void and of no effect and set aside.

b. That a Receiver be appinted according to the law and the usage of this Court, and that such Receiver be authorized, directed and empowered to take immediate possession of the irrigation system in this complaint referred to and to receive and collect all sums due from all water contract holders in said irrigation system entitled to receive water therefrom under the order of this court, including interest, and to hold, use and dispose of the same as directed by this Court for the purposes in this complaint set out, and that each and all of the complainants and all water contract holders in said irrigation system who are to receive water therefrom

under the order of this Court be authorized and directed to pay any and all sums due on said contracts to said Receiver, and
39 that the said defendant Twin Falls Salmon River Land & Water Company and the defendant Salmon River Canal Company, Limited, and each of them, and their and each of their agents, officers, attorneys, servants, employees and assigns, be restrained and enjoined from collecting or attempting to collect any such sums of money so due from any settlers or water contract holders in said irrigation system, or their assigns.

c. That the said Receiver be empowered and directed to secure additional supply of water for such segregation, if the same be found feasible; or, in lieu thereof, this Court direct the manner and method of reducing the said segregation to a point within the water supply, so that the land remaining shall have appurtenant thereto an ample supply of water and not less than the amount claimed by these complainants as stated in this complaint, and that the water rights and water contracts for all land beyond and outside of said area so established as aforesaid, be annulled, canceled and held for naught, and the defendant Salmon River Canal Company, Limited, be authorized and directed to cancel the corporate stock therefor, and be restrained and enjoined from recognizing such land as entitled to water, or from delivering or furnishing water to or for said lands.

d. That it be adjudged, decreed and determined that in the event spch segregation be reduced as aforesaid, the owner or holder of the land and appurtenant water right, be entitled to receive from the said trust fund under the direction of this Court, any and
40 all sums of money paid on account of the purchase of said water right, with legal interest thereon, together with all other legal damage to be determined by this Court, resulting to such owner or holder by reason of the cancellation of his said water right.

e. That this Court decree, determine and fix all priorities existing, if any, by reason of settlement and improvement, and that pending a final determination of this action, the defendants Salmon River Canal Company, Limited, and Twin Falls Salmon River Land & Water Company, be enjoined and restrained from delivering or furnishing any water to any land not actually in cultivation at the time of the filing of this complaint.

f. That the said Receiver be authorized and directed to take immediate possession and control of said irrigation system described in this complaint and to deliver and furnish water as covenanted to be furnished on the terms and conditions of the Settlers Contract and State Contract herein to the lands entitled thereto, and that the said Receiver take possession of all monies due or collected for maintenance for the year 1914, and for the subsequent years if the Receiver be in charge of said irrigation system, or until further order of this Court, and use and expend the same in the operation

and repair of said irrigation system, and that the defendant Twin Falls Salmon River Land & Water Company and the defendant Salmon River Canal Company, Limited, their servants, agents, officers and employees be directed to turn over the money col-
41 lected by them, if any, for maintenance charges during the year 1914 to said Receiver.

g. That the said Receiver be authorized and directed to maintain the expenses incurred by these complainants in this action, and to pay the costs, attorneys' fees, witness fees and other proper items of expense as may be directed by this Court.

h. That the said Receiver be authorized and directed to issue Receiver's certificates from time to time as may be ordered by this Court for the purpose of said Receivership.

i. That the defendant Twin Falls Salmon River Land & Water Company be compelled to account to this Court for any and all sums converted and used by it from the maintenance charges collected by the defendant Salmon River Canal Company, Limited, and misappropriated by said Twin Falls Salmon River Land & Water Company as in this Bill set out.

j. That these complainants and all water contract holders in said irrigation system hereinbefore described, have such other or further relief in the premises as may be just and equitable, together with the costs and disbursements of this action.

Answer under oath waived.

C. O. LONGLEY,
W. E. GOLDEN,
Solicitors for Complainants,
Residing in Twin Falls, Idaho.

Duly verified.

Endorsed: Filed Nov. 9th, 1914. A. L. Richardson, Clerk, by E. B. Yarington, Deputy.

42 PLAINTIFF'S EXHIBIT "A."

Filed with Amended Complaint.

(Title of Court and Cause.)

Agreement Between the State of Idaho and Twin Falls Salmon River Land and Water Company.

This Agreement, Made and entered into in duplicate this 30th day of April, 1908, by and between the State of Idaho, the party of the first part, through the State Board of Land Commissioners of said State, said Board consisting of Frank R. Gooding, Governor, Robert Landson, Secretary of State, John J. Guheen, Attorney General, and S. Belle Chamberlain, Superintendent of Public Instruction of

said State, and the Twin Falls Salmon River Land and Water Company, a corporation organized and existing under the laws of the State of Delaware and duly authorized to do business in the State of Idaho (having complied with the laws thereof relative to foreign corporations), the party of the second part, Witnesseth; That

Whereas, the party of the second part has succeeded to all the rights of C. B. Hurtt, George F. Sprague, I. B. Perrine and H. L. Hollister for the irrigation of lands in Twin Falls County, State of Idaho, which rights are evidenced by the Proposal and Request heretofore made by them on the 12th day of August, 1907, which Proposal and Request were approved by the State Board of Land Commissioners of the State of Idaho on the 12th day of August, 1907.

and

43 Whereas, all of the property rights and franchises of the said C. B. Hurtt, George F. Sprague, I. B. Perrine and H. L. Hollister acquired under and by virtue of the said accepted proposal and request have by the consent of the State Board of Land Commissioners been duly transferred to the party of the second part herein.

It is mutually agreed and covenanted as follows:

Purpose of the Contract.

I. That for and in consideration of the covenants of the said party of the first part herein contained, the party of the second part agrees to construct and build those certain irrigation works mentioned and described in the aforesaid Proposal and Request dated on the 12th day of August, 1907, and hereinafter more particularly described and to sell shares or water rights in said canal and irrigation system from time to time as hereinafter provided to the person or persons filing upon the lands hereinafter described and also to the owners of other lands not described herein but which are susceptible of irrigation from this canal system or from any extension or enlargement thereof; said shares or water rights to be sold on the terms hereinafter provided and also to transfer the ownership, management and control of said canal system to the purchasers of shares or water rights as hereinafter provided.

44 General Specifications for Construction.

Reservoir.

II. The reservoir is to be formed by a masonry dam two hundred and ten feet in height, five hundred and fifty feet long on top, founded upon a solid rock foundation and extending from wall to wall of the lava Canyon on Salmon River in Section 18, Township 14 South of Range 15 East, Boise Meridian, in Twin Falls County, State of Idaho.

The reservoir formed by the dam will have a surface area of over three thousand acres, an available capacity of 180,000 acre feet and

will extend southward from the dam a distance of approximately twelve miles.

Dam.

The dam will be constructed of rock solidly imbedded in concrete. Its top width to be fifteen feet, its bottom width (210 feet below the crest) will be one hundred and nineteen feet; it will be built upon an arch of two hundred and twenty-five feet radius and with a height and length as above specified.

Tunnels.

The water will be diverted from the reservoir through a tunnel ten feet by ten feet in Section equipped with suitable metal gates in concrete settings.

The first tunnel will be approximately 2,500 feet long followed by an open cut approximately 800 feet long which cut will be followed by a second tunnel of the same length and cross section as the first. The tunnels are to be concrete lined where necessary and to be built upon a grade of one in one thousand.

Canal.

Beyond the end of the second tunnel described above the water shall be conveyed in open channels to the land to be reclaimed, using in part artificial channels and in part natural channels of suitable section grade and character of material. Both natural and artificial channels shall have a capacity of one-hundredth of one second feet of water for each acre of land served by them.

The main canal above the first point of distribution shall have a capacity of one thousand second feet, which is likewise the capacity of the tunnel section.

The grades and cross sections of the canal may vary to suit the local conditions and natural channels or coulees shall be utilized when suitable.

In earth sections, the main canal shall have a bottom width of thirty-two feet, a water depth of eight feet, the sides shall have slopes of three to one and the grade of the canal shall be one in five thousand.

Outlets from the main canal shall be built of concrete or other equally durable material with gates of wood or steel.

The canal system is to be surveyed and laterals are to be hereafter located, all entries of land being made subject to such location.

Changes in these plans and specifications may be made by second party with the consent of the State Engineer and the State Board of Land Commissioners.

Detailed plans will be hereafter filed with the State Engineer and with the State Land Board and when so approved, shall become final.

Right of Way.

III. The said party of the first part grants to the said party of the second part a right of way across all lands belonging to the State of Idaho or that may be ceded to the State by virtue of the Act of Congress commonly known as the Carey Act or by any other laws (and particularly the lands hereinafter described), for the construction and operation of said canals, reservoirs and distributing system therefrom and for the necessary waste ditches which right of way shall be equal to the actual width of the canal, lateral or waste ditch, at its base from toe to toe of the embankment together with a strip of land along one side of such canal, lateral or waste ditch adjacent thereto not to exceed fifty feet in width along the main canal, thirty (30) feet in width along the laterals branching from said main canal and a proper width along the smaller laterals and waste ditches; said right of way to be located and designated by the Chief Engineer of the party of the second part and approved by the State Engineer and in all cases to be sufficient for ingress and egress along said canal, lateral or waste ditch in proportion as the necessity therefor exists and all water users on lands irrigated from said canal or laterals shall have such right of way as may be necessary from
47 second party's canal or laterals to their own land in order to construct and maintain the necessary service ditches for their own use and such right of way across said land as may be necessary for waste ditches.

No more laterals, service or waste ditches shall be constructed across any premises than are necessary in the opinion of the Chief Engineer of the Company and the State Engineer. The laterals, service and waste ditches shall be constructed under the direction of the Chief Engineer of the Company and subject to the approval of the State Engineer. In case any land owner is dissatisfied with the location of any service ditch across his premises, he shall have the right to appeal to the State Engineer whose decision shall be final.

Detailed maps showing the location of canal, laterals, reservoir and waste ditches shall be filed with the Board and with the State Engineer, but such filing need not be made prior to the lands being thrown open for settlement. No compensation shall be paid to land owners for the right of way herein provided for.

Apropriation of Water.

IV. The party of the second part is the owner of that certain water right evidenced by permit No. 2659 for 1,500 cubic feet per second of the waters of Salmon River in Twin Falls County, State of Idaho, issued by the State Engineer of the State of Idaho, to be used for the irrigation of the lands described in Exhibit "A"
48 herewith, together with other lands susceptible of irrigation from said system, which water right is hereby dedicated for use upon said lands and it is agreed and understood that the dam hereinbefore mentioned shall be constructed so as to provide a

reservoir for the impounding of 180,000 acre feet of water, which amount, in addition to the normal flow of the said stream during the irrigation period, has been determined to be sufficient to furnish two and three-fourths acre feet of water per acre for each acre of land to be irrigated.

And the second party promises and agrees to build and construct the canal and lateral system of sufficient capacity to deliver water to the users thereof at the rate of one-hundredth of a second foot per acre for each acre of land to be irrigated.

Entry of Lands.

V. Upon the execution of this contract and when the actual construction of said canal shall have been inaugurated the said party of the first part will, after notice given in conformity with law, throw open the hereinafter described lands or a specified portion thereof for settlement under such regulations as to the manner of said opening as shall be prescribed by the State Board of Land Commissioners.

Application for Lands.

VI. The said party of the first part through its State Board of Land Commissioners agrees that it will not approve any application for or filing on the lands hereinafter described until the
49 person or persons so applying shall furnish to the said Board a true copy of the contract entered into with the party of the second part for the purchase of sufficient shares of water rights in said irrigation works for the irrigation of said lands; said shares or water rights to be evidenced by the stock of the Salmon River Canal Company, Limited, as hereinafter provided and the said second party stipulates and agrees that to the extent of the capacity of the irrigation works and to the extent of the water rights to which it is entitled as rapidly as the lands are open for entry and settlement, it will sell or contract to sell water rights or shares for land to be filed upon the qualified entrymen or purchasers without preference or partiality other than that based upon priority of application, it being understood, however, that priority of application or priority of entry or settlement shall not give any priority of right to the use of water flowing through the canal against subsequent purchasers but shall entitle the purchaser to a proportionate interest only therein, the water rights having been taken for the benefit of the entire tract of land to be irrigated from the system. The priority of application upon the opening days shall be determined by a system to be devised under the direction of the State Board of Land Commissioners.

Sale of Land by the State.

VII. That the said party of the first part, acting through its State Board of Land Commissioners, agrees to sell the lands herein described to such persons as are or may be by law entitled to file upon
50 the same for the sum of Fifty cents ($.50) per acre, half of which sum shall be paid at the time of application for the

entry of such lands made to said Board and the remaining one-half at the time of the making of final proof thereon.

Price of Water Rights.

VIII. Said party of the second part further agrees and undertakes that it will sell or cause to be sold to the person or persons filing upon any of the lands herein described or to the owners of any other lands not described herein but which are or may be susceptible of irrigation from its canal system by good and sufficient contract of sale with right of possession and enjoyment by the purchaser pending its fulfillment a water right or share in said canal for each and every acre filed upon or purchased from the State or acquired from the United States. Each of said shares or water rights shall represent a carrying capacity in said canal sufficient to deliver water at the rate of one-hundredth (1-100) of one (1) cubic foot of water per acre per second of time and each share or water right sold or contracted to be sold as herein provided shall also represent a proportionate interest in said canal and irrigation works together with all rights and franchises therein based upon the number of shares finally sold in said canal; said irrigation system, however, is to be built in accordance with the plans heretofore filed with the Board, which system, according to said plans, has been determined by the State Engineer to have the carrying capacity hereinbefore
51 mentioned. Such water rights or shares shall be sold to the person or persons aforesaid for the lands hereinafter described or for lands which are susceptible of irrigation from said system as follows:

To the person or persons filing upon any of said lands at a price not exceeding Forty Dollars ($40) per share to be paid for as follows: One-fifth (1/5) in cash at the time of sale and the remainder in five equal annual installments bearing interest at the rate of six per cent. (6%) per annum payable annually. To the person or persons purchasing any portion of sections No. 16 or 36, which are susceptible of irrigation and reclamation from this canal at a price not to exceed Thirty Dollars ($30) per share provided said water rights are purchased within one year after the purchase of the lands from the State and not exceeding Forty Dollars ($40) per share at any time thereafter; said payments upon said State lands to be made one-seventh (1/7) at the time of purchase and the remainder in six (6) equal annual installments with interest thereon at the rate of six per cent. (6%) per annum payable annually. In case the purchaser or entryman on desert lands, homestead lands or any lands other than those segregated under the Carey Act declines to purchase water rights within one year after the Carey Act lands are thrown open for settlement, the sum of two dollars and forty cents ($2.40) may be added to the price of water rights for each year's delay or fraction thereof. No charge shall be made for water rights for lands taken by the right of way for any railroad filing its
52 plat with the State Board of Land Commissioners prior to June 1, 1908, and all entries of land shall be made subject to such right of way.

This agreement shall not be construed to prevent the sale of shares or water rights on terms more favorable than those herein provided or to prevent the payment of installments on the purchase price in advance of maturity of the same at the option of the purchaser but in no case shall water rights or shares be dedicated to any lands before mentioned or sold beyond the carrying capacity of the canal or in excess of the appropriation of water therefor.

Transfer of Possession and Management of Canal.

IX. It being necessary to provide a convenient method of transferring the ownership and control of said canal from the said party of the second part herein to the purchasers of water rights in said canal and for determining their rights among themselves and between said purchasers and the party of the second part herein; for the purpose of operating and maintaining said canal during the period of construction and afterwards for the purpose of levying and collecting toll charges and assessments for the carrying on and maintenance of said canal and the operation and management thereof, it is hereby provided that as soon as said lands are ordered thrown open for settlement a corporation to be known as the Salmon River Canal Company, Limited, shall be formed at the expense of the party of the second part, the articles of incorporation of said Company to be in substantially the form which is filed herewith and
53 made a part hereof; that the authorized capital stock of said corporation shall be one hundred and fifty thousand shares (150,000) which amount is intended to represent one share for each acre of land which may be hereafter irrigated from said canal. The entire authorized amount of the capital stock of said corporation shall be delivered to the party of the second part herein in consideration of the covenants and agreements herein contained in order to enable it to deliver to purchasers of water rights the shares of stock representing the same; said shares of stock, however, shall have no voting power and shall not have force and effect until they have been sold or contracted to be sold to the purchasers of land under this irrigation system. At the time of the purchase of any water right or as soon thereafter as convenient there shall be issued to the purchaser thereof one share of the capital stock of said corporation for each acre of land entered or filed upon; that the said party of the second part therein shall in case of said water rights or shares of stock are not fully paid for require the endorsement and delivery to it of said stock and shall at the same time require of said purchaser an agreement that until thirty-five per cent. of the purchase price of said stock has been paid, the said party of the second part therein shall vote said stock in such manner as it may deem proper at all meetings of the stockholders of said corporation and the said Salmon River Canal Company shall have the management, ownership and control, as above set out, of the said canal system as fast as
54 the same is completed and turned over by it for operation by the said party of the second part, as hereinafter provided. Whenever it is certified by the Chief Engineer of the Company and

the State Engineer that certain portions of the said canal are completed for the purpose of operation, the same may, with the consent of the State Land Board be turned over to the Salmon River Canal Company, Limited, for operation. Such transfer and operation, however, shall not in any manner lessen the responsibility of the said second party with reference to the terms of the contract, nor shall such consent on the part of the State Land Board be construed as a final acceptance of such portion of such canal, it being always understood that the acceptance of such canal must be in its entirety and that the bond given for the faithful performance of the said contract must be made and be liable for the substantial completion of the entire canal system.

Water Rights Dedicated.

X. The certificate of shares of stock of the Salmon River Canal Company, Limited, shall be made to indicate and define the interests thereby represented in the said system, to-wit: A water right of one-hundredth of a cubic foot per second for each acre of land irrigated as provided in paragraphs IV. and VIII. of this contract and a proportionate interest in the said canal and irrigation works based upon the number of shares ultimately sold therein.

While the party of the second part shall retain control of
55 the said Salmon River Canal Company, Limited, water shall be measured to users from the place of division at the main laterals of such irrigation system in such quantities and at such times as the condition of the crops and the weather may determine but according to such rules and regulations, based upon a system of distribution of water to the irrigators in turn and by rotation as will best protect and serve the interests of all the users of water from said canal system.

It is agreed that said system of distribution by rotation shall be devised by the party of the second part and used by the Salmon River Canal Company, Limited, in case the necessity arises during the period while it retains the management of the Salmon River Canal Company, Limited.

The sale of the water rights to the purchasers shall be a dedication of the waters to the lands to which the same is to be applied. Water shall only be delivered through said system during the irrigation season, to-wit, between April 1st and November 1st of each year. A domestic supply when necessary outside of the irrigation season shall be delivered under such rules and regulations and under such terms and conditions as shall be determined by said Salmon River Canal Company, Limited.

Management of Water and Charges for Delivery.

XI. The party of the second part agrees to construct the said canal system so that the water conducted through the same may be avail-

able at a point not to exceed one-half mile measured in a direct
56 line from each quarter section of land herein described and to be irrigated and reclaimed by water conducted through said canals; that it will construct and place in position all head-gates, flumes, weirs and other devices for the control and measurement of water in the main canals and reservoirs and in the main laterals it being intended that the settler shall under the directions of the Chief Engineer of the second party build and furnish one gate or measuring device for his own use but that all other gates, weirs and measuring devices in the main canals, main or subordinate laterals shall be furnished and constructed by the second party.

Plans for measuring devices, head-gates and weirs are to be approved by the State Engineer. No charge shall be made to the purchaser for the delivery of water prior to the first day of January, 1911. For each succeeding year thereafter while the second party retains the control of the said Salmon River Canal Company, Limited, said company may charge and assess the purchasers of water rights in said irrigation system the sum of thirty-five cents ($.35) per acre for each acre of land for which a water right has been purchased; said sum to be due and payable on the first day of March of each year. If the sum so raised shall be insufficient prior to January 1st, 1913, for the purpose of maintaining, operating and keeping in repair said system and paying the expenses of the management thereof, the said second party will furnish the additional funds necessary to supply such deficiency. After said date, the actual cost of maintenance is to be paid by the settler.

57 A main lateral, within the meaning of this contract, is a lateral taken from the main line of this canal. A subordinate lateral, within the meaning of this contract, is a lateral built for the purpose of conducting water from a main lateral to a point within half a mile of the place of intended use. A coulee or draw used as a main lateral shall also be included within these terms.

Completion of System.

XII. Said party of the second part agrees to begin work on said irrigation system within six months from the date of this contract and to complete 1-5 of the construction work within two years from this date; that the construction work shall be prosecuted diligently and continuously to completion and that a cessation of work under this contract for a period of six months after the second year without the sanction of the State Board of Land Commissioners will forfeit to the State all rights under this contract.

Second party agrees to have said canal system constructed in accordance with this contract within five years from the date hereof; it being understood, however, that detailed plans and specifications of said work have not yet been completed and that such detailed plans and specifications are to be approved by the State Engineer and that with his consent and the consent of the State Land Board alterations and changes may be made in the plans prepared and filed.

Forfeiture.

XIII. It is agreed that the rights of second party herein
58 may be forfeited in accordance with the laws of the State of Idaho relative to that subject which are now in force and effect.

Estimated Cost.

XIV. The esti-ated cost of the proposed irrigation works is $2,-500,000 and upwards and the price at which water rights are fixed herein and for which liens are hereby authorized and created against the separate legal sub-divisions of land herein described are deemed necessary in order to pay the cost and expenses of reclamation and interest thereon. The existing laws under which this contract is made are understood and agreed to be a part of this contract.

Description of Lands.

XV. The lands hereinbefore referred to are lands donated by the Act of Congress to the State of Idaho, under and pursuant to the Act of Congress approved August 18th, 1894, and the Amendments relating thereto, commonly called the Carey Act, and also other lands hereinafter described, the irrigation and reclamation of which lands this contract is designated to effect. The lands to be reclaimed under said "Carey Act" are fully set forth in the list herewith marked Exhibit "A" which is hereby referred to and made a part hereof.

Highways.

XVI. Entries of land are understood to be made subject to a right of way without compensation to the entrymen, for roads upon all exterior section lines, and also upon all half section lines which may be designated by the Board of County Commissioners as may be provided by law.

59 Water Supply for Cities and Towns.

XVII. It is understood and agreed that so much water as may be necessary for the use of cities and towns and the inhabitants thereof, which cities and towns must necessarily take their water supply from said system of canals, shall be furnished from said canal system to said cities and towns and the inhabitants thereof, upon such terms of sale or rental as may be agreed upon by the party of the second part and said cities and towns or the owners of the lands upon which the same are established or the inhabitants therein. Said cities and towns or the inhabitants thereof must contribute to the maintenance and support of said canal system in proportion to the amount of water used by them and shares of stock of the Salmon River Canal Company, Limited, shall be issued for the amounts of water repre-

sented by said use to the inhabitants thereof or to the trustees of any village or the mayor of any city in trust for the use and benefit of the towns and cities and inhabitants thereof.

Delivery of Water to Users.

XVIII. It is agreed that the said Salmon River Canal Company, Limited, shall not deliver water to or permit the use thereof from said irrigation system by persons who have not purchased water rights, or who are not holders of stock in said Salmon River Canal Company, Limited, or who are not otherwise entitled thereto under this contract.

60 Mortgage.

XIX. The right, title and interest of the second party in the irrigation works and system may be mortgaged, the form of such mortgage to be approved by the Attorney General of Idaho.

Amendments.

XX. This contract may be altered and amended by the first party with the consent of the second party for the purpose of carrying out the object of the contract and for the purpose of meeting any conditions now unforeseen.

Detailed plans and specifications shall be filed from time to time as the work progresses with the State Engineer and the State Land Board for their approval.

With the consent of the State Land Board, the irrigation system hereby contracted for may be enlarged second party so as to cover lands not under the irrigation system, as at present designed, such extensions, however, be a part of this system.

Coulees and Draws.

XXI. Coulees and draws may be used as waterways when convenient, but all coulees and draws utilized as laterals from which water is to be taken by settlers for irrigation shall be so constructed and improved as to practically conform to artificially constructed laterals of like capacity so that water may be available for use from the same, in practically the same manner and at approximately the same expense, and it is further agreed that the specifica-
61–73 tions as to the construction and improvements of said coulees and draws shall be filed from time to time as the work progresses with the State Engineer and the State Land Board for their approval, it being understood that this paragraph is to be liberally construed in order that no unnecessary improvement of coulees need be made.

With the consent of the State Land Board, changes may be made in the number, location and capacity of the reservoirs.

Whereas, All the requirements of the law have been, in so far as this contract is concerned, fully met and in every respect complied with; the execution of this contract is therefore ordered.

In witness whereof, The said party of the first part, the State of Idaho, has by resolution of its State Board of Land Commissioners, caused this agreement to be signed in duplicate by its governor, who is ex-officio president of said State Board of Land Commissioners, and attested by the registrar of said Board.

And, the said party of the second part has hereunto caused its corporate name to be subscribed by its proper officer and to be duly attested, as provided by resolution of this Board of Directors.

* * * * * * *

74 (Title of Court and Cause.)

In Equity.

No. 494.

Amended Answer of Twin Falls Salmon River Land & Water Company to Amended Bill of Complaint; also Cross-bill.

Comes now the defendant herein, the Twin Falls Salmon River Land and Water Company, a corporation, answering the amended bill of complaint herein and says:

1.

Admits the allegations contained in paragraph one of the amended bill herein.

2.

Admits the allegations contained in paragraph two of the amended bill herein.

3.

Admits the allegations contained in paragraph three of the amended bill herein.

4.

Admits the allegations contained in paragraph four of the amended bill herein.

75 5.

Admits the allegations contained in paragraph five of the amended bill herein.

6.

Admits the allegations contained in paragraph six of the amended bill herein.

7.

Admits that the Twin Falls Salmon River Land and Water Company made and entered into a contract with the State of Idaho, a copy of which contract is attached to and filed with the amended bill herein and marked Exhibit "A," and made a part thereof and which is referred to in the said amended bill as the State Contract, and contracted as therein specified and not otherwise.

8.

That it was understood and agreed by and between the Twin Falls Salmon River Land and Water Company and the State of Idaho, in and by said agreement, that said defendant should have the right to sell water rights or shares in the said irrigation system as provided and set forth in said contract, Exhibit "A," and not otherwise.

9.

Defendant admits that on or about the first day of June, 1908, the complainant, A. E. Caldwell, by himself or his predecessor in interest, made entry of the lands described in paragraph nine of the amended bill herein and purchased or contracted to purchase one hundred sixty (160) shares of stock in the Salmon River
76 Canal Company, Limited, representing the water right for said lands and that said Caldwell at said time entered into an agreement in writing for said purpose, said agreement or contract being commonly known as the Settler's Contract and being in the form Exhibit "C" attached to the amended bill herein.

10.

Defendant admits that the complainants herein, and various other settlers mentioned in the amended bill herein, on the first day of June, 1908, and at various times thereafter, made entries similar to the entry of the complainant Caldwell for various tracts of land within the limits of the irrigation project designated in Exhibits "A" and "B" referred to in the amended bill and that the said settlers or entrymen of lands under said irrigation project described in said Exhibit "A" made and entered into contracts similar in form to the contract Exhibit "C," commonly known as the Settler's Contract. That defendant does not know whether the list Exhibit "B" is correct or not, and therefore denies that said list is a correct list.

11.

Defendant admits that on or about the first day of June, 1908, and prior to the filing of the bill herein, that the defendant, the Twin Falls Salmon River Land and Water Company, entered into contracts with divers persons who made entry of lands under the said irrigation project described in said Exhibit "A" and commonly re-

ferred to as the Salmon River Segregation in the form Ex-
77 hibit "C" and covering approximately 73,000, but not 75,000 acres of land, and that the rights of the said parties holding said contracts are in accordance with said contracts and with the said contract, Exhibit "A," and not otherwise, and that said parties have no rights except such as are conferred by the said contracts, Exhibits "A" and "C."

That entrymen on approximately fifteen thousand (15,000) acres of land within said area of 73,000 acres, who had contracted and agreed in the form of the contract Exhibit "C" to purchase shares representing water rights in the said irrigation system to the extent of approximately fifteen thousand (15,000) shares have, as defendant is informed and believes, failed and neglected to settle upon, cultivate or improve their lands as required by law and for that reason the entries of land on said segregation have become void and of no force and effect and are subject to cancellation at any time and that for this reason there are not now outstanding valid settlers' contracts, as defendant is informed and believes, for more than sixty thousand (60,000) shares or water rights in the said irrigation works representing approximately 60,000 acres of land in said segregation.

12.

That it was understood, agreed and contemplated by the terms of the said State Contract, Exhibit "A," and said settler's contract, Exhibit "C," hereinbefore referred to as is stated, set forth and agreed in said contracts and not otherwise.

78 13.

Defendant avers that the appropriation provided for by the State Contract for the irrigation works and system referred to in the amended bill herein consists of the flow of Salmon River together with its tributaries and rainage thereof above the point of diversion and none other; that the normal flow of the stream fluctuates to a great extent and that therefore, under the terms of the Contract, Exhibit "A," it was provided that water should be stored for irrigation purposes. Defendant denies that the dam or reservoir, or either of them, lose a great deal of water by seepage or evaporation, or any amount in excess of the normal and customary amounts under such circumstances, and defendant denies the amount of water so lost is or will continue to be very great. Defendant denies that a great deal of water is lost in transportation from the dam or reservoir to the various farm units, or that any water is lost in transportation from the dam or reservoir to the various farm units in excess of the customary or usual amount under such circumstances, and denies that the same is or will continue to be very great. Defendant denies that the amount of the available supply of water for use on the several land entries referred to in the amended bill after deducting the loss mentioned in paragraph thirteen of the amended bill herein is or will be inadequate to irrigate the acreage entered upon

and under water contracts sold, and denies that the said available supply of water for use on the several land entries will not
79 exceed 50,000 acre feet or that it cannot be determined that more than 50,000 acre feet of water will be available for the use of the water right holders under said irrigation works delivered at a distance of one-half mile from each quarter section of land under said segregation.

14.

Defendant denies that in order to comply with the provisions of the Carey Act, or to irrigate or reclaim the lands mentioned in the amended bill herein or to reclaim said land or to raise ordinary agriculture crops thereon, that at least one-half miner's inch per acre continuous flow of water throughout the entire irrigation season, or at least two and three-fourths (2¾) acre feet of water per acre, if delivered by periods of rotation as the needs of the crops demand (said amount of water to be delivered within one-half mile of the respective land entries), is or will continue to be necessary, and defendant denies that a less amount or any less amount will be wholly or at all insufficient to raise ordinary agricultural crops, or that a less amount will not enable the complainants and settlers upon said tract to comply with the Carey Act regarding a permanent water supply to reclaim said land or enable them to farm or cultivate their land profitably and defendant denies that unless the complianants and all settlers upon said Salmon Tract are able to secure the amount of water claimed in paragraph fourteen of the amended bill for their land that a great deal or any of such land will remain idle or
80 unproductive or that the owners or holders thereof will suffer great or irreparable injury or damage or any injury or damage whatever.

15.

Defendant avers that it was provided for and contemplated by the said State Contract, Exhibit "A," and the said Settler's contract, Exhibit "C," that water should be furnished and delivered in accordance with the terms of said contracts and not otherwise, or that it should be delivered at any place other than that specified in the said contract, or that it should be delivered in any amount, time or manner except in accordance with an efficient administration of the water supply and a skillful use thereof by the farmer, or in any manner other than to enable the farmer to raise the crops suitable to the existing conditions, and defendant denies that it was provided or contemplated by the said State Contract and the Settler's Contract that the water right purchased by the complainants and other settlers on said tract per share or acre was or would be a right to receive one one-hundredth of a cubic foot of water per acre per second of time equal to one-half miner's inch for each acre of land irrigated by a continuous flow during an entire irrigation season extending from April 1st to November 1st of each year, or an equal or

proportionate amount if delivered by rotation or by periods of time and defendant denies that the irrigation season extends from the first day of April to the first day of November of each year but alleges that the irrigation season fluctuates from year to year,
81 and defendant avers that the State Contract, Exhibit "A," was made and entered into after an investigation and examination by the State Engineer of the State of Idaho of the water supply available for the irrigation of the lands described in Exhibit "A"; that the State Engineer of the State of Idaho made report to the State Board of Land Commissioners of said State in pursuance of law that the water supply was sufficient for the irrigation of the said lands described in said Exhibit "A" and which were thrown open for entry and that after said report by the said State Engineer, the State Board of Land Commissioners of the State of Idaho made and entered into said Contract, Exhibit "A."

16.

Defendant denies that at or prior to the time of the making of the settler's contract herein, it was represented to complainants or to other purchasers of water rights or shares in said irrigation system by this defendant that ample water was available to supply the rights of these complainants and all of the settlers on said system or that any representations whatever were made other than as appear in said contracts Exhibits "A" and "C," and denies that the complainants or a large number of settlers on said tract relied upon any representations, made by this defendant and that relying upon such representations cleared their lands or a large portion thereof and have planted such land with crops which are now growing upon said land.

82 17.

Defendant denies that it has failed or neglected or refused or that it still fails or neglects or refuses to comply with the terms or conditions of the State Contract hereinbefore referred to in any respect whatever either as set up in paragraph seventeen of the amended bill herein or otherwise, and denies that it has or that it still fails, neglects or refuses to so construct its irrigation system as to make water available in ample or sufficient quantities to furnish complainants or other settlers upon said tract with the water necessary for the reclamation of their lands as provided in said contracts and defendant denies that in violation of its contract or otherwise with the State of Idaho, herein referred to as the State Contract, that it sold a large or any number of water contracts or shares in the said irrigation system described in said Exhibit "A," by the terms of which it undertook to furnish to such water-contract holders a great or any amount of water in excess of the appropriation of water made by the defendant or assigned to it and referred to in said State Contract, and defendant denies that it has sold or delivered a large or any amount of water from its reservair system to persons or corporations other than actual settlers or contract holders upon said segregation

and denies that it has sold or delivered, or that it still sells or delivers from the irrigation and reservoir system mentioned in the amended bill herein a large or any amount of water to persons or corporations other than settlers upon said Salmon River Tract mentioned in the amended bill herein.

83 Defendant further avers that as it is advised and believes, the Salmon River Canal Company, Limited, loaned a certain amount of water not to exceed 1,000 acre feet to persons who obtained an order or request therefor from stockholders of said company during a short time in the season of 1914, which water was later to be returned, but that this defendant has no intention or purpose of selling or disposing of any waters other than to persons holding contracts in the form Exhibit "C."

18.

Defendant denies that it has failed or neglected or refused to comply with the terms or conditions of the said State Contract, Exhibit "A," or the Settler's Contract, Exhibit "C," herein referred to in any respect or at all, or that it has failed or neglected or refused to supply an ample or sufficient supply of water to the complainants or either or any of them, or to any of the other settlers upon said tract, or to either or any of them, or that it has failed or neglected or refused to supply an amount of water in excess of about three-fourths of an acre foot per acre, and defendant denies that approximately three-fourths of an acre foot of water per acre is the only amount now or heretofore available for the use of all of the land under said segregation. Defendant further avers that the only source of water supply for the said tract is the said Salmon River and its tributaries above the point of diversion of the dam described in said Exhibit "A."

84 19.

That defendant has no knowledge, information or belief concerning the matters set up in paragraph nineteen of the amended bill herein and therefore denies each and every of the allegations therein contained, and defendant further denies that the said State Board of Land Commissioners were either justified by any facts or authorized by any law to take the action or any of the actions demanded by the complainants herein in paragraph nineteen of the amended bill herein or that the said State Board of Land Commissioners had any right or authority to bring any action in court in regard to any of the said matters in said paragraph of said amended bill and denies that the said State Board of Land Commissioners had any right, power or authority to require the defendant herein to procure the additional supply of water for the irrigation works mentioned in the complaint or to reduce the acreage of land mentioned or to cancel, or annul any of the contracts already entered into between the settlers and the defendant herein. Defendant admits that said Land Board has the power and that it is its duty to cancel entries of

land under said system in case of a failure to comply with the law as to residence or cultivation.

20.

Defendant denies that the Department of the Interior is now or at any time has withheld its decision for the issuance of the patents for lands under said irrigation works pending proof that said land had been reclaimed within the contemplation of the pro-
85 visions of the Carey Act, or that it has heretofore notified the State Land Board of the State of Idaho that the acreage in said segregation must be reduced because of the insufficiency of the water.

21.

Defendant denies that an additional water supply is necessary to be supplied to the said segregation so as to furnish each acre with the amount of water necessary for the irrigation thereof and denies that if additional water is not furnished, or if water contracts be not canceled and the acreage of said segregation reduced, that the complainants or either or any of them, or other contract holders, or either or any of them, will suffer great or irreparable injury or any injury whatever and defendant denies that if the contract holder entitled to receive water is furnished only the proportionate amount of water now available that the entire or any portion of the segregation will be spotted with uncultivated areas, or any uncultivated areas whatever, or that there will be areas not properly cultivated because of an insufficient water supply.

22.

Defendant denies that the balance due under and by virtue of the terms and conditions of the State Contract and the Settlers' Contracts and because of any failure on the part of the defendant to comply with the terms or conditions of said State Contract, and the said Settlers' Contract that the balance due from the complainants or either or any of them, or from the settlers on the tract, or
86 either or any of them, was intended to be or should be or does constitute a trust fund for the purpose of carrying out the terms or conditions of the State Contract, or the Settlers' Contracts for the purpose of the Carey Act, or particularly to supply entrymen and contract holders with a supply of water in a substantial ditch as claimed in the amended bill herein. Defendant admits that there is now due from the complainants and from the contract holders under said project as it now exists a sum equal to and in excess of about thirty-seven ($37.00) dollars per acre or a total of about two million seven hundred seventy-five thousand dollars ($2,775,000.00).

23.

Defendant denies that since it has notified settlers under its system that water was available for delivery that it has through the defend-

ant, the Salmon River Canal Company, Limited, collected large sums of money from water-contract holders including the complainants, ostensibly for maintenance charges but that in reality such sums and a great portion thereof, were used in the payment of excessive and illegal salaries and expenses of the officers, employees or attorneys of this defendant and denies that this defendant through the Salmon River Canal Company, Limited, at the times or in the manner stated in paragraph twenty-three of the amended bill herein collected such maintenance charges from all water-contract holders upon said segregation although only a portion of the water contracted to be delivered was in fact delivered; denies that this
87 defendant fraudulently or otherwise applied such maintenance charges so collected as stated in the amended bill herein in paying either excessive or illegal salaries of employees or attorneys, or paying exorbitant rent for buildings or in the purchase of equipment for its own use or benefit or for the use or benefit of its kindred projects or any of them and not for the use and benefit of said Salmon River Canal Company, Limited, and defendant further avers that all maintenance charges and assessments, as it is informed and believes, that had been made by the Salmon River Canal Company, Limited, have been charged only against such persons as were legally liable therefor and only in proper amounts, and that only proper payments were made out of said fund.

24.

Defendant denies that the Twin Falls Salmon River Land and Water Company is insolvent or unable to respond in damages to the complainants or other holders of contracts on said tract and denies that unless the several or total amounts due from complainants or other contract holders be treated as a trust fund to carry out the terms and conditions of the said State Contract and the Settlers' Contract, that the complainants or any of them or all contract holders, or any of them under said segregation, will be without adequate remedy, or will suffer great or irreparable loss or injury, or that said irrigation system will be a failure or that said segregation and no part thereof will be entitled to patent from the United States.

88 25.

Defendant avers that no additional supply of water is necessary to irrigate the lands now entered upon said segregation or for which water contracts have been issued and deny that said irrigation project cannot be made a success unless a tract of land not to exceed 30,000 acres in extent be set apart as land subject to water rights and that all other lands on said segregation be released and declared to be without a water right thereon.

26.

Defendant avers that the rights of the settlers and water-contract holders under said irrigation project are for a proportionate interest

in the said water rights and irrigation works described in Exhibit "A," and that all contract holders are entitled to a proportionate part of the water supply and a proportionate part in the irrigation works and the rights appurtenant thereto, and defendant denies that unless the relative rights of the entrymen are fixed by an order or decree of the court that the amount of the acreage under cultivation will be so great that water will not be sufficient to irrigate the same but only a small portion thereof and denies that great confusion, trouble or injury will result to all or any persons holding water rights in said system, or that a multiplicity of suits prosecuted by such persons so interested will follow. Defendant further avers that under the terms of the Contract, Exhibit "A," that the said irrigation system, as fast as the same was completed for
89 operation, was to be turned over to the Salmon River Canal Company, Limited. That the same was completed for operation; that the certificate of the Chief Engineer of the Salmon River Canal Company, Limited, was made as provided by Exhibit "A" and that the same was presented to the State Engineer of the State of Idaho, who approved the same, and transmitted the same to the State Board of Land Commissioners, but that no order has ever been made by the State Board of Land Commissioners of the State of Idaho turning over the said system or any portion thereof for operation to the Salmon River Canal Company, Limited, although said Salmon River Canal Company, Limited, was properly entitled to have said system turned over for such purpose; that in actual practice, said Salmon River Canal Company, Limited, has taken possession and control of the said system and operated the same.

27.

Defendant avers that the Salmon River Canal Company, Limited, is in control of said irrigation system in the manner and under the conditions above set forth but denies that the same is under the dominion of the defendant, the Twin Falls Salmon River Land & Water Company, or that the Twin Falls Salmon River Land & Water Company has any power or authority over said Salmon River Canal Company, Limited, except as may arise from the conditions of the contracts Exhibits "A" and "C"; that the length of time that the Twin Falls Salmon River Land & Water Company will
90 continue to vote the stock in the Salmon River Canal Company, Limited, of the various plaintiffs and other settlers upon said irrigation project depends entirely upon the promptness with which the payments are made upon the water contract known as the Settlers' Contracts, Exhibit "C"; that the votes electing the present Board of Directors of the Salmon River Canal Company, Limited, were cast chiefly by the Twin Falls Salmon River Land and Water Company under the authority given in the contracts Exhibits "A" and "C," and defendant denies that all of the officers of the Salmon River Canal Company, Limited, are the agents of this defendant, and defendant denies that the interests of all of the settlers on the Salmon River Tract, or the owners or holders of

contracts in said irrigation works are adverse except in this case to the interest of this defendant and defendant denies that it has refused or that it still refuses to take any steps to protect the interests of the Salmon River Canal Company, Limited, in the matters set forth in the amended bill herein, or that it has in any manner been requested to take any steps whatever in this matter and further denies that the Salmon River Canal Company, Limited, has in any manner been requested to take any action with regard to any of the matters set forth in the bill herein or to bring any suit thereon, and defendant denies that the complainants are compelled to institute this action not only in their own behalf but in the behalf of and for the benefit of all settlers and water-contract holders on said tract, or for the benefit of the Salmon River Canal Com-
91 pany, Limited, and defendant denies that it would be useless to demand or ask the defendant, the Salmon River Canal Company, Limited, to institute or prosecute this action.

28.

Defendant avers that the Salmon River Canal Company, Limited, controls the distribution of water in the irrigation works herein referred to to the consumers and that the Twin Falls Salmon River Land and Water Company does not control such distribution and defendant denies that it or the Salmon River Canal Company, Limited, have refused or still refuses to supply complainants or any of them, or other contract-holders or any of them upon said tract the water as contemplated or constructed or provided in the State Contract, and the Settler's Contract Exhibits "A" and "C," or that this defendant or the said Salmon River Canal Company, Limited, have fraudulently pretended that the water heretofore supplied is ample for the acreage entered and defendant denies that it or the Salmon River Canal Company, Limited, have refused to deliver water in the quantities contemplated by the said contracts Exhibit "A" and "C" as required thereby and denies that in fact this defendant or the said Salmon River Canal Company, Limited, delivered water to such settlers or any settlers, including the complainants, or any of them, in a very much less amount; denies that unless this court during the pendency of this action appoints a receiver or receivers, or takes possession of said irrigation works or operates the same for the benefit of those entitled to water therefrom, that this defendant will
92 continue to oppress these complainants or any of them, or the settlers on said tract or any of them, and denies that any acts of this defendant will result in the multiplicity of suits; denies that this defendant or the Salmon River Canal Company, Limited, have refused or still refuse to adopt a reasonable or proper system of delivery of water, or one required by the conditions of the crops or that they or either of them have refused or still refuse or that they will continue to refuse to recognize the rights of the complainants and other settlers upon said tract, or either or any of them, but allege that the said water will be furnished and delivered according to the best methods of practice and in pursuance of the contracts Exhibit- "A"

and "C" and defendant denies that it or the Salmon River Canal Company, Limited, have not delivered or will not deliver an ample supply of water during any period of delivery or as the needs of the crops require, and defendant denies that the results of its methods or system of delivery has been to cause hardship or annoyance or loss of crops, and denies that to continue its method of water delivery will produce great or any loss or damage, or numerous claims for offsets and reimbursements from the several amounts due from settlers or that it will greatly affect the funds so due or the collection thereof and defendant denies that the collection of the funds due from the settlers cannot be effectually accomplished without the aid of a receiver or without the appointment of a receiver for the operation of the irrigation works.

93

29.

Defendant admits that prior to the first day of June, 1908, and prior to the time of the making of any land entries by any settler upon said Salmon Tract that it executed a deed of trust to the defendant, the American Trust & Savings Bank, Trustee, as set forth in the answer of the said trustee filed herein and defendant alleges that said trust deed did create a valid lien upon all of the property therein described and defendant admits that it assigned to the said trustee a larger portion of the water contracts made with settlers upon said tract.

30.

Defendant admits the allegations contained in paragraph thirty of the amended bill.

31.

Defendant denies that it has failed or neglected or refused to comply with the terms or conditions of the said State Contract, Exhibit "A," or the Settler's Contract in the form Exhibit "C," or that it has failed, or neglected or refused, or that it still fails, neglects or refuses to complete its irrigation system in any respect or at all so as to comply with the terms and conditions of the said contracts, Exhibits "A" and "C," or to furnish or make available the water required by it to be furnished to the contract holders in accordance with the terms or conditions of the said State Contract and said Settlers' Contracts, Exhibits "A" and "C" and denies that the pretended lien of the trust deed is subject or subordinate to the rights of the

94

purchasers of shares or water rights in said irrigation system but alleges the said deed of trust was taken subject to and in pursuance of the said Contract Exhibit "A" which contract authorized the making thereof and denies that said trust deed is null or void or of no effect as against the complainants, or any of them, or against the other water contract holders in said irrigation system, or any of them.

32.

Defendant admits the making of the assignment mentioned in paragraph thirty-two of the amended bill and alleges that the same is regular and valid and not pretended.

33.

Defendant denies that the said assignment referred to in the amended bill in paragraphs thirty-two and thirty-three thereof was made without a valuable consideration.

34.

Defendant denies that the questions sought to be determined in this action are of common or general interest to all settlers upon said Salmon Tract, or to all water contract holders thereon and denies that they constitute a class so numerous as to make it impracticable to bring them all before the court.

35.

Defendant denies that the complainants or any of them, or the other settlers upon said Salmon Tract, or any of them, have
95 not a plain, speedy or adequate remedy at law, or that they will suffer great or irreparable wrong or injury unless the court grants the relief prayed for.

And further answering, defendant says that the amount of water claimed as necessary in the amended bill herein for the use of the plaintiffs and others upon said tract is an amount in excess of that required for beneficial use and that the use of the amount of water as set forth as being demanded in the amended bill herein upon the lands described in said bill would be injurious to said lands and would result in the depreciation of the security afforded by the water contracts commonly called the settlers' contracts in the form Exhibit "C," and would impair the security covered by the lien granted under the statute to the Twin Falls Salmon River Land and Water Company herein.

36.

Cross-bill.

And the Twin Falls Salmon River Land and Water Company, by way of cross bill herein against the plaintiffs above mentioned and all in whose behalf they may be acting, and also by way of counterclaim and further answer, avers as follows:

That on account of the soil and physical conditions existing upon said Salmon tract and upon the lands to the north thereof which are likely to receive the drainage therefrom, that it is absolutely essential

for the best interests of the said Salmon River Tract and of
96 all of the settlers thereon, that very great care should be used in the application of water to said lands for irrigation purposes and also in regard to the amount thereof which is applied for said purpose, and if great care is not used in the irrigation of said lands, that a large area thereof will become valueless and the security afforded by the water contracts hereinbefore mentioned will become lost and that large numbers of suits will be brought by persons upon adjoining tracts for injury to lands done by reason of waste and seepage waters from the Salmon tract.

That it is necessary for the settlers upon said tract to use great skill in the application of water to their said lands and for the Salmon River Canal Company and the Twin Falls Salmon River Land and Water Company to cause only so much water as may be necessarily required for the irrigation of crops to be run into said canals described in the contract Exhibit "A."

That the application of the amount of water demanded by the plaintiffs in the amended bill herein and the manner of use desired and demanded therein would result in great damage and injury to a large portion of the lands on the said Salmon tract and in the destruction of the security afforded to the Twin Falls Salmon River Land & Water Company and its successors in interest under the terms of the water contract, Exhibit "C."

That under the terms of the contract, Exhibit "A" (Par. X of said contract), attached to the amended bill herein, it is the duty
97 of the Twin Falls Salmon River Land and Water Company, while it shall retain control of the said Salmon River Canal Company, as specified in said contract, Exhibit "A," to cause water to be measured to users from the place of diversion at the main laterals of the irrigation system in such quantities and at such times as the condition of the crops and weather may determine but according to such rules and regulations based upon a system of distribution of water to the irrigators in turn and by rotation as will best protect and serve the interests of all the users of water from said canal system.

That the use of a rotation system is necessary in the distribution of the water to settlers on said tract in order that the minimum amount of injury may be done to the lands irrigated from said canal system and in order that the security represented by the water contracts mentioned in the amended bill herein may not be impaired and also for the purpose of most equitably and efficiently distributing the water supply in order that effective use may be made thereof by all of the settlers upon said tract and in order that an unnecessary amount of water may not be used.

That the plaintiffs herein are members and officers of a settlers' association, being a voluntary association organized by a portion of the settlers on said project and that the said settlers' association and the plaintiffs in the amended bill herein, the officers thereof, have joined together and conspired to prevent the use of a rotation system in the use of water and to prevent the use of water on said
98 tract under proper and suitable rules and regulations in accordance with the terms of the said contract, Exhibit "A,"

and to prevent the proper and suitable distribution of the water supply under suitable rules and regulations now in use and those which will hereafter be made, and that they will continue to so join together and conspire and to bring numerous and vexatious suits in regard to said matter unless restrained by the order of this court; that the plaintiffs herein are acting for themselves and for other persons members of the said water users' association; that the joining together and conspiring and bringing of the suits above mentioned are adverse to the interests of the settlers and water users on said tract not members of the settlers' association; that it is the duty of the Twin Falls Salmon River Land and Water Company and of the Salmon River Canal Company, Limited, to handle and distribute the water supply in such manner as will best protect and serve the interests of all the users of water from the canal system and that this cannot be done unless the rules and regulations prescribed by the Twin Falls Salmon River Land & Water Company and the Salmon River Canal Company are complied with and unless a proper and suitable system of the distribution of water by rotation is maintained.

That unless said rules and regulations are reserved and said system of rotation maintained, it will be impossible to distribute the water supply to the irrigators upon said tract in such manner as will best protect and serve the interests of all of the users
99–104 of water from said canal system and the security represented by the contracts made in the form, Exhibit "C," will be greatly impaired and in part destroyed.

Wherefore, The Twin Falls Salmon River Land and Water Company prays that the amended bill of the plaintiff herein may be dismissed and that the plaintiffs herein and all members of the Settlers' Association, of which said plaintiffs are members and officers, be enjoined and restrained from bringing any suits or in any manner interfering with the delivery and distribution of the water supply through the irrigation system herein mentioned, according to the rules and regulations established therefor and in accordance with the rotation system and said Twin Falls Salmon River Land and Water Company prays that all proper relief may be granted herein.

S. H. HAYS,
Attorney for Defendant,
Residing at Boise, Idaho.

Duly verified. Endorsed: Filed March 29, 1915. A. L. Richardson, Clerk, by Pearl E. Zanger, Deputy.

105 (Title of Court and Cause.)

Answer of Commonwealth Trust Company of Pittsburgh, Trustee.

Now comes the Commonwealth Trust Company of Pittsburgh, Trustee, and saving and reserving to itself all manner of benefit or advantage of exception that can or may be had or taken to the
106 many errors, uncertainties and imperfections in the said amended bill contained, with like effect as if this defendant

had demurred thereto, for answer to said amended bill or to such parts thereof as this defendant is advised it is necessary or material for it to make answer thereto, answering says:

I.

This defendant is not advised save by the allegations of said amended bill of complaint, and is without knowledge as to the citizenship or residence of any of the parties plaintiff to said suit, and it therefore leaves the complainants to make such proof thereof as they may be advised is material or as they may be able to produce, but this defendant admits that the said Twin Falls Salmon River Land & Water Company is a corporation organized under the laws of the State of Delaware and is a citizen of said State, and that the Salmon River Canal Company, Limited, is a corporation organized under the laws of the State of Idaho and is a citizen of said State; that the said John M. Haines, W. L. Gifford, Grace Sheperd, Joseph H. Peterson and Fred L. Huston are officials of the State of Idaho as alleged in paragraph IV of said amended bill of complaint and constitute the State Board of Land Commissioners of said State; that this defendant, the Commonwealth Trust Company of Pittsburgh, is a corporation organized under the laws of the State of Pennsylvania and a citizen of said State with its principal office in the City of Pittsburgh, and that the defendant A. C. Robinson is a citizen
107 and resident of said State of Pennsylvania residing in the City of Pittsburgh, said State.

II.

This defendant admits that on or about the 30th day of April, A. D. 1908, the defendant, Twin Falls Salmon River Land & Water Company, made and entered into a contract with the State of Idaho, the latter acting by and through its State Board of Land Commissioners; admits that said contract was entered into under the terms of the Act of Congress commonly known as the Carey Act, approved August 18th, 1894, and certain other acts of Congress amendatory thereof or supplemental thereto, and the laws of the State of Idaho accepting the terms of said acts of Congress, made in furtherance thereof and for the purpose of carrying out the terms, provisions and conditions of said Acts of Congress; admits that said contract contemplated and provided for the construction of an irrigation system consisting of a storage reservoir in Twin Falls County, said State, for conserving and storing the waters of the Salmon River and for the purpose of diverting and carrying said water so stored and conserved to the lands to be reclaimed therefrom; and this answering defendant is not fully advised as to the terms of said contract and is without knowledge whether the contents thereof are correctly stated in paragraph VI of the amended bill of complaint herein, and it, therefore, prays that complainants be required to make strict proof of the terms and provisions of said contract of April 30th, 1908.

108

III.

This defendant is without knowledge as to the facts alleged in paragraph VIII of said amended bill of complaint, and it therefore prays that the complainants be required to make strict proof of each and every allegation contained in said paragraph VIII of the said amended bill herein.

IV.

This defendant is not advised, save by the allegations of said amended bill, as to whether on or about the 1st day of June, 1908, the complainant A. E. Caldwell by himself or his predecessor in interest, made entry with the State Board of Land Commissioners for the lands described in paragraph IX of said amended bill, or as to whether said complainant or his predecessor in interest purchased water rights or entered into a contract or contracts as alleged in said paragraph IX, and this defendant, being without knowledge as to said facts, leaves the complainants to make such proof thereof as they may be advised is material and as they may be able to produce.

V.

This defendant is not advised, save by said amended bill of complaint, whether the said complainants or any of them or various other settlers on the tract of land in said amended bill referred to, made entries by themselves or their predecessors in interest for tracts of land under what is referred to as the Salmon River Segregation in said amended bill, or as to whether such entries are fully described in complainants' Exhibit "B," referred to in said amended
109 bill, and this defendant, being without knowledge as to the allegations contained in paragraph X of said amended bill, prays that complainants may be required to make strict proof of each and every of said allegations.

VI.

This answering defendant is not advised, save by said amended bill of complaint, whether the Twin Falls Salmon River Land & Water Company on or about the 1st day of June, 1908, or at any other time, sold to persons who held entries or owned land on said Salmon River Segregation, about seventy-five thousand shares or water rights in the irrigation works referred to in said amended bill, and being without knowledge as to the matters set forth in said paragraph XI in said amended bill, this answering defendant prays that complainants may be required to make strict proof of each and every allegation contained in said paragraph XI.

VII.

This defendant is not advised, save by said amended bill, as to what was understood or agreed or contemplated by the terms of the

contract referred to in said amended bill as the State Contract, and being without knowledge as to said matters and each of the allegations contained in said paragraph XII of said amended bill, this defendant prays that complainants be required to make strict proof of each and every allegation contained in said paragraph XII; but this defendant, upon its information and belief, denies that under or by the terms or conditions of what is referred to in said
110 amended bill as the Settlers' Contracts, the owners of shares or water rights in said irrigation system are entitled to receive one-hundredth (1-100) of a cubic foot of water per acre per second of time for the irrigation of the lands described in their respective contracts, but on the contrary, this defendant alleges on its information and belief, that such water was to be delivered in turn or by rotation at such times and in such quantities as said Twin Falls Salmon River Land & Water Company or said Salmon River Canal Company, Limited, should deem necessary or proper.

VIII.

This defendant is not advised, save by said amended bill, as to the water supply of said irrigation system or as to the flow of said Salmon River, or as to any of the facts alleged or set forth in paragraph XIII of said amended bill, and being without knowledge as to the facts set forth in said paragraph XIII, it prays that complainants may be required to make strict proof of each and every of the allegations contained in said paragraph.

IX.

This defendant is not advised, save by said amended bill, as to whether the lands of complainants and others on said Salmon River tract are dry and arid in character and will not produce crops except by irrigation, and as to the amount of water that may be required per acre, and as to whether such water must be furnished in continuous flow or by periods of rotation, and as to any of the
111 other facts set forth in paragraph XIV of said amended bill, and being without knowledge as to such facts or any of them, prays that complainants be required to make strict proof of each and every allegation contained in said paragraph XIV.

X.

This defendant is not advised, save by said amended bill, whether it was provided for or contemplated by the State contract or what is referred to in said amended bill as the Settlers' Contracts, that an ample supply of water was and would be provided and actually furnished through said irrigation works as alleged in paragraph XV of said amended bill, and being without knowledge as to said allegations and as to any of the other allegations contained in said paragraph XV except as herein otherwise expressly admitted or denied, this defendant prays that complainants be required to make

strict proof of each and every allegation contained in paragraph XV of said amended bill; but this defendant, upon its information and belief, denies that complainants or other settlers upon said tract, or any of them, are entitled to receive one-hundredth (1-100) of a cubic foot of water per acre per second of time for each water right or share purchased, either by continuous flow or during the irrigation season from April 1st to November 1st of each year, or an equal or proportionate amount if delivered by rotation or by periods of time.

XI.

This defendant is not advised, save by said amended bill,
112 as to any of the facts set forth in paragraph XVI of said amended bill, and being without knowledge as to said facts or any of them, it prays that complainants be required to make strict proof of each and every allegation contained in said paragraph XVI.

XII.

This defendant is not advised, save by said amended bill, as to any of the facts set forth in paragraph XVII of said amended bill, and being without knowledge as to said facts or any of them, prays that complainants be required to make strict proof of each and every allegation or the facts set forth in said paragraph XVII.

XIII.

This defendant is not advised, save by said amended bill, as to any of the facts set forth or allegations contained in paragraphs XVIII, XIX, XX and XXI of said amended bill, and being without knowledge as to the facts contained in said paragraphs, and each and every of them, this defendant prays that complainants be required to make strict proof of the allegations contained in said paragraphs XVIII, XIX, XX and XXI.

XIV.

This defendant denies that under or by virtue of the terms and conditions of what is referred to in said amended bill of complaint as the State Contract or the Settlers' Contracts, or because of the failure of the defendant Twin Falls Salmon River Land & Water Company to comply with the terms or conditions of said
113 State Contract or the Settlers' Contracts the balance due from the complainants or other settlers on said tract or the purchasers of water rights was intended to be or to constitute a trust fund for the purpose of carrying out the terms or any of the terms or conditions of either the said State Contract *of* the said Settlers' Contracts, or any of them, or the purposes of the said Act known as the Carey Act, or to supply the entrymen or contract holders with an ample or sufficient supply or any supply of water

in a substantial or other ditch; but, on the contrary, this defendant alleges that the amount due under said water contracts or settlers' contracts is due and payable to the owners or holders of said contracts. This defendant is not advised, save by said amended bill of complaint, as to the amount due under said Settlers' Contracts, and it, therefore, leaves complainants to make such proof thereof as they may be advised is material or as *that* may be able to produce.

XV.

This defendant is not advised, save by said amended bill, as to any of the facts set forth in paragraph XXIII of said amended bill, and being without knowledge as to said matters, this defendant therefore leaves the complainants to make such proof of the facts contained in said paragraph XXIII as they may be advised is material or as they may be able to produce.

XVI.

This defendant is not advised, save by said amended bill,
114 as to whether said Twin Falls Salmon River Land & Water Company is insolvent or unable to respond in damages to complainants and other holders of contracts on said Salmon tract, and it, therefore, leaves complainants to make such proof thereof as they may be advised is material or as they may be able to produce. But defendant denies that unless the amount due from complainants and other holders be treated as a trust fund to carry out the terms and conditions of such State Contract and the said Settlers' Contracts, complainants, or any of them, or the other contract holders or any of them on said project will be without adequate remedy or will suffer great or irreparable loss or injury, or that said irrigation system will be a total failure or that patent will not issue from the United States to the State of Idaho or the persons entitled thereto for lands embraced in said segregation.

XVII.

This defendant is not advised, save by said amended bill, as to whether it is either necessary or feasible to secure an additional supply of water for the lands embraced in said segregation, and being without knowledge as to said facts, it prays that complainants be required to make strict proof thereof; but this defendant denies that said irrigation project can not be made a success unless the irrigable area in said tract be reduced to thirty thousand acres, or to any other area less than the amount for which water rights have been sold; denies that any of the lands under said segrega-
115 gation should be released or declared without water right therein, and upon its information and belief, alleges that the Court is without authority, power or jurisdiction to cancel any of the contracts for the sale of water rights under said Salmon River

project or to reduce the acreage entitled to water from said irrigation system.

XIX.

This defendant is not advised, save by said amended bill, as to the allegations contained in paragraphs XXVI and XXVII of said amended bill relative to the control of the Salmon River Canal Company, Limited, by the said Twin Falls Salmon River Land & Water Company, or as to any of the facts set forth in said paragraphs XXVI and XXVII, and being without knowledge as to said facts or any of them, it prays that complainants be required to make strict proof of each and every allegation contained in said paragraphs XXVI and XXVII.

XX.

The defendant is not advised, save by said amended bill, as to whether either the said Twin Falls Salmon River Land & Water Company or the said Salmon River Canal Company, Limited, *have* failed or refused to supply complainants or other contract holders under said irrigation system with water as contemplated by the State Contract or the Settlers' Contracts, or *have* failed to furnish or supply persons entitled to water from said irrigation system to the amount of water to which they may be entitled as alleged in paragraph XXVIII of said amended bill, and being without
116 knowledge as to such facts, it prays that the complainants be required to make strict proof of each and every of said allegations. And defendant, on its information and belief, denies that unless a receiver is appointed for said irrigation system and for operating the same, the said Twin Falls Salmon River Land & Water Company will oppress complainants or other settlers on said tract, or that its operations or conduct or management of said irrigation system will result in a multiplicity of suits or any suits; denies that either the said Twin Falls Salmon River Land & Water Company or the Twin Falls Canal Company, Limited, has refused or will refuse to adopt a reasonable or proper system of delivery or as required by the condition of the crops, or will refuse to recognize the rights of complainants and other settlers on said tract, or any of them, or will refuse to deliver water to complainants and other contract holders on said tract, at such times and in such manner and in such quantities as they may be entitled to receive the same under their respective contracts, and upon its information and belief this defendant further denies that complainants and other settlers or persons entitled to receive water from said irrigation system have not in the past received the water to which they were entitled or as the needs of their respective crops required the same, or that the methods or system of delivering water to complainants and other settlers on said tract has caused hardship, annoyance or loss of crops, and this defendant likewise denies, upon its

information and belief, that a continuation of the system or
117 method of delivering water in the past will produce any loss or damage to the complainants or persons entitled to water from said system, or will result in numerous or other claims for off-sets or reimbursements from the amounts due from settlers under their respective contracts for the purchase of water rights; and denies that the amount due from settlers or purchasers of water rights constitutes a trust fund available for any purpose except for the payment of the bonds issued under the mortgage or trust deed under which this defendant is trustee or under other similar obligations providing for the pledge or deposit of such water contracts, or by mortgage or lien upon said irrigation system or on said water contracts, or both such irrigation system and water contracts; that as to whether the settlers upon said tract, or any of them, will refuse to pay the balance due on their water contracts unless such balance be held to constitute a trust fund for the purposes set forth in paragraph XXVIII of said amended bill, this defendant is not advised, save by said amended bill, and being without knowledge as to such matters, prays that complainants be required to make strict proof of said allegations and each of them.

XXI.

This defendant admits that some time after the 1st day of June, A. D. 1908, but as of said date, the said Twin Falls Salmon River Land & Water Company made, executed and delivered a certain
118 mortgage or deed of trust conveying to the American Trust and Savings Bank, a corporation organized under the laws of the State of Illinois, with its principal office in the City of Chicago, said State, as Trustee, the irrigation system, water rights and water appropriations described or referred to in plaintiffs' amended bill of complaint, including the reservoirs, dams, canals, ditches, laterals and other structures of every kind used in connection with or forming a part of said irrigation system, together with all rights of way, easements, privileges and franchises required for the proper operation and use of said irrigation system, and that as further and additional security for the payment of the bonds issued and to be issued under said mortgage or deed of trust there was assigned to and deposited with the said Trustee, The American Trust and Savings Bank, contracts sometimes referred to in said amended bill as Settlers' Contracts, to the aggregate amount par value, as this defendant is informed and believes, of $2,337,319.92; and that, pursuant to the terms and provisions of said mortgage or deed of trust, the said American Trust and Savings Bank, Trustee, certified and delivered the negotiable coupon bonds of said Twin Falls Salmon River Land & Water Company to the amount of $1,773,000.00, par value; that said bonds were issued upon the terms and conditions stated in said mortgage or deed of trust referred to in paragraph XXIX of said amended bill and only after there had been duly assigned to and deposited with the said Trustee water con-

tracts or settlers' contracts to the amount aforesaid; that this
119 defendant denies on its information and belief that said mortgage or deed of trust was made or executed or said bonds issued or delivered or said water contracts assigned to said Trustee before the construction of said irrigation works referred to in said amended bill, and this defendant prays leave to refer to said original mortgage or deed of trust when the same may be produced or to the record thereof referred to in said amended bill for a full and complete statement of the terms and conditions of said instrument and the terms and conditions upon which said water contracts or settlers' contracts were assigned to and deposited with said Trustee and said bonds issued, certified and delivered; and this defendant alleges that the bonds so issued, certified and delivered, as aforesaid, to the amount of $1,773,000.00, par value, were negotiated and sold by said Twin Falls Salmon River Land & Water Company to divers and sundry persons who purchased the same for value without notice or knowledge of any offset or defense on the part of the makers of said water contracts or settlers' contracts against the payment of the amount due thereunder, and said bonds are still outstanding, as this defendant is informed and believes and so alleges the fact to be, and in the hands of innocent holders for value, who purchased the same relying upon the faith and credit of said water contracts and settlers' contracts so assigned to and deposited and pledged with the said Trustee as security for the payment of said bonds, and rely-
120 ing upon the fact that the amount specified in said contracts, and each of them, as the purchase price of the water rights or shares of stock therein mentioned would be paid with interest thereon at the times and in the manner in said contracts stated, and relying upon the fact that said contracts were a first and prior lien upon the lands therein respectively described.

XXII.

This defendant admits that on or about the 8th day of October, A. D. 1914, the said American Trust and Savings Bank (now the Continental and Commercial Trust and Savings Bank), Trustee, resigned as Trustee under said mortgage or deed of trust and that this defendant thereafter and on or about the 9th day of October, A. D. 1914, succeeded to said trusteeship and is now the duly appointed, qualified and acting Trustee under said mortgage or deed of trust and holds the said water contracts or settlers' contracts under said mortgage or trust deed as security for the payment of the negotiable coupon bonds of said Twin Falls Salmon River Land & Water Company issued, sold, certified and delivered as aforesaid and held as aforesaid by innocent holders for value.

XXIII.

This defendant, according to its information and belief, denies that the said Twin Falls Salmon River Land & Water Company has failed, neglected or refused to comply with the terms or conditions,

or any of them, of the said State contract or the said settlers'
121 contracts, or any of them; denies that by reason of any alleged or pretended default of said Twin Falls Salmon River Land & Water Company, the lien of said mortgage or trust deed is either impaired or subordinated or made subject or subordinate to the rights of purchasers of shares or water rights in said irrigation system, and denies that the grantee *is* said deed of trust took said deed of trust subject to the conditions, or any of the conditions, mentioned in paragraph XXXI, or any other paragraph or part of said amended bill; denies that the lien of said mortgage or trust deed is null or void or of no effect as against the said complainants or any other water contract holders in said irrigation system, or any other person, corporation or body politic.

XXIV.

This defendant is not advised, save by said amended bill, as to the allegations contained in paragraphs XXXII and XXXIII of said amended bill relative to an alleged assignment from said Twin Falls Salmon River Land & Water Company to the defendant, A. C. Robinson, of certain water contracts, and it, therefore, leaves complainants to make such proof of the allegations contained in said paragraphs XXXII and XXXIII as they may be advised is material or as they may be able to produce.

XXV.

This defendant is not advised, save by said amended bill, as to the facts alleged in paragraphs XXXIV and XXXV of said
122 amended bill, and being without knowledge as to the facts set forth in said paragraphs, it prays that complainants may be required to make strict proof of each and every allegation contained in said paragraphs XXXIV and XXXV.

XXVI.

Further answering complainants' amended bill, this defendant says that it is informed and believes, and therefore states the fact to be, that under the terms and provisions of the said water contracts or settlers' contracts and under the said State contract referred to in the amended bill herein, and under the Act of Congress commonly known as the Carey Act and the amendments thereto and the laws of the State of Idaho passed in furtherance of said Acts of Congress in order to obtain the benefit thereof, the said complainants and other purchasers of water rights in said irrigation system are only entitled to a proportionate interest in said irrigation system, water rights and water appropriations based upon the number of shares or interests finally sold therein.

XXVII.

As to each of the allegations of said amended bill not in this answer expressly admitted or denied, this defendant prays that the complainants may be required to make strict proof thereof and of each of such allegations of said amended bill as against this defendant.

Wherefore, having fully answered complainants' amended bill of complaint filed herein, this defendant prays to be hence
123 dismissed with its costs and charges in his behalf most wrongfully sustained.

COMMONWEALTH TRUST COMPANY OF PITTSBURGH,
Trustee,
By RICHARDS & HAGA,
It Solicitors.

Endorsed: Filed December 10, 1914. A. L. Richardson, Clerk.

1 & 2 TRANSCRIPT OF RECORD.

Supreme Court of the United States, October Term, 1921.

No. —.

TWIN FALLS SALMON RIVER LAND AND WATER COMPANY, a Corporation; Commonwealth Trust Company of Pittsburgh, Trustee, and A. C. Robinson, Appellants,

vs.

A. E. CALDWELL, W. F. MIKESELL, V. E. MORGAN, J. E. POHLMAN, W. C. Pond, James W. Beauchamp, Carl Washburn, and Harold M. Sims, in Their Own Behalf and in Behalf of All Persons Similarly Situated With Them, and Salmon River Canal Company, a Corporation, Appellees.

Volume III.

Upon Appeal from the United States Circuit Court of Appeals for the Ninth Circuit.

3 In the United States Circuit Court of Appeals for the Ninth Circuit.

TWIN FALLS SALMON RIVER LAND AND WATER COMPANY, a Corporation; Salmon River Canal Company, a Corporation; Commonwealth Trust Company of Pittsburg, Trustee, and A. C. Robinson, Appellants,

vs.

A. E. CALDWELL, W. F. MIKESELL, V. E. MORGAN, J. E. POHLMAN, W. C. Pond, James W. Beauchamp, Carl Washburn, and Harold M. Sims, in Their Own Behalf and in Behalf of All Persons Similarly Situated with Them, Appellees.

TRANSCRIPT OF THE RECORD.

Upon Appeal from the United States District Court for the District of Idaho, Southern Division.

4–8 *Names and Addresses of Attorneys of Record.*

S. H. Hays,
Boise, Idaho,
Solicitor for Twin Falls Salmon River Land & Water Co.

P. B. Carter,
Boise, Idaho,
Solicitor for Salmon River Canal Co.

Richards & Haga,
Boise, Idaho,

A. W. Edwards,
St. Louis, Mo.,
Solicitors for Commonwealth Trust Co. of Pittsburgh, Trustee, and A. C. Robinson.

Appellants:

James R. Bothwell,
Twin Falls, Idaho.

Sullivan & Sullivan,
Boise, Idaho,
Solicitors for Appellees.

Turner K. Hackman,
Twin Falls, Idaho,
Solicitor for Intervenors.

9 In the United States District Court for the District of Idaho, Southern Division.

(Title of Court & Cause.)

Order.

It appearing that the taking of testimony on behalf of the defendants in this cause could not be concluded at this time, counsel for plaintiffs thereupon moved the Court for the appointment of a receiver to take possession of and operate the irrigation system
10 constructed by the defendant Twin Falls Salmon River Land & Water Company under its contract with the State of Idaho, dated April 30, 1908, and for making certain work and improvements upon that part of said irrigation system known as the Check Basin; and the Court having heard counsel for the respective parties and being fully advised in the premises,

It is hereby ordered, adjudged and decreed as follows:

1. That the application for the appointment of such receiver be denied on condition that the defendant Twin Falls Salmon River Land & Water Company on or before the 10th day of April, 1919, furnish a good and sufficient bond, to be approved by the Judge of this Court, or by counsel for the plaintiffs, in the penal sum of Twenty Thousand Dollars ($20,000.00), to A. E. Caldwell, one of the plaintiffs in this cause, on behalf of himself and all other shareholders and water users of the defendant Salmon River Canal Company, Limited, who shall pay the maintenance charges for the year 1919, hereinafter mentioned; conditioned, and that if it shall finally be determined in this action that the construction of the bank now in process of construction in said Check Basin is not a proper maintenance charge to be collected by the defendant Salmon River Canal Company, Limited, from its stockholders and water users, but that the construction of said bank should be made at the expense of the said Twin Falls Salmon River & Water Company
11 as a construction charge, the said Twin Falls Salmon River Land & Water Company shall pay into the Registry of this Court within thirty (30) days after such final determination the amount which may be so improperly collected as a maintenance charge, to-wit: Fifty cents per share or acre, for refund or return to such shareholders or water users who may have paid the same.

2. That until said bond has been furnished, as aforesaid, the defendant Salmon River Canal Company, Limited, shall set aside and hold intact and as a special fund, subject to the further order of this Court, the amount paid by the shareholders and water users on account of such improvement, to-wit: fifty cents per share.

3. That the said plaintiffs be, and they hereby are, and each of them is hereby restrained and enjoined from commencing, maintaining or prosecuting any action or proceeding in any court of the

State of Idaho to compel the said Salmon River Canal Company, Limited, to deliver water without the payment of such maintenance charge; and the said A. E. Caldwell is hereby especially enjoined and restrained from further prosecuting, until the further order of this Court, that certain action commenced by him as plaintiff on or about the 15th day of March, 1919, in the District Court of the Fourth Judicial District of the State of Idaho, in and for Twin Falls County, against the said defendants and certain other
12 parties; Provided, that if the bond hereinbefore mentioned is not given on or before the 10th day of April, 1919, the provisions of this paragraph restraining or enjoining the said plaintiffs, or any of them, or said Caldwell from bringing, maintaining or prosecuting actions in the State Courts shall immediately upon such default in the furnishing of such bond become ineffectual and considered as annulled and dissolved, and the said Salmon River Canal Company, Limited, its officers, agents, employees and servants, shall, in the event of such default, be restrained and enjoined from collecting from its shareholders and water users the said fifty cents per share or acre without any further order in the premises.

Dated this 25th day of March, 1919.

FRANK S. DIETRICH,
District Judge.

Filed March 26, 1919.
W. D. McREYNOLDS,
Clerk.

(Title of Court and Cause.)

Bond Pursuant to Order Dated March 25 *and Filed March* 26, 1919.

Know all men by these presents: That we, Twin Falls Salmon River Land & Water Company, as Principal, and Fidelity & Deposit Company of Maryland, a corporation organized under the laws of the State of Maryland as surety, are held and firmly bound
13 unto A. E. Caldwell, one of the above-named plaintiffs, on behalf of himself and all other shareholders and water users of the defendant Salmon River Canal Company, Limited, who shall pay the maintenance charges for the year 1919, specially mentioned in paragraphs 1 and 2 of a certain order, a copy of which is hereunto annexed, in the just and full sum of Twenty Thousand Dollars ($20,000.00), for the payment of which, well and truly to be made, we bind ourselves and each of us, and our, and each of our successors and assigns firmly by these presents.

Sealed with our seals and dated this 8th day of April, 1919.

The condition of this obligation is such, that whereas the above-named Twin Falls Salmon River Land & Water Company, one of the above-named defendants, desires to give a bond in the said sum of Twenty Thousand Dollars ($20,000.00) for the purpose of obtaining the benefits and advantages that will secure it by the giving of such bond under a certain order made in the above-entitled cause

on the 25th day of March, 1919, and filed with the Clerk of said Court on the 26th day of March, 1919, a copy of which said order is hereto annexed, marked Exhibit "A" and hereby referred to for a statement of the terms and provisions thereof.

Now, therefore, if the said Twin Falls Salmon River Land & Water Company shall pay into the Registry of the above-
14 entitled Court within thirty (30) days after it shall be finally determined in the above-entitled cause that the construction of the bank now in process of construction in what is known as the Check Basin of the irrigation system referred to in the annexed order, is not a proper maintenance charge to be collected by the defendant Salmon River Canal Company, Limited, from its stockholders and water users, but that the construction of said bank should be made at the expense of said Twin Falls Salmon River Land & Water Company as a construction charge, the amount which may be so improperly collected as a maintenance charge by said Salmon River Canal Company, Limited, to-wit: fifty cents per share or acre, for refund or return to such shareholders or water users who may have paid the same, then the above obligation shall be void; otherwise the same shall be and remain in full force and virtue.

In witness whereof, The said Principal and the said Surety have hereunto caused their respective names to be subscribed by their respective officers and their respective seals affixed, the day and year first above written.

TWIN FALLS SALMON RIVER LAND & WATER COMPANY,
[SEAL.] By A. C. ROBINSON,
President.

Attest:
J. D. BUSH,
Secretary.

15 FIDELITY & DEPOSIT COMPANY OF MARYLAND,
By SIDNEY C. FULD,
Its Attorney in Fact.

Attested and Sealed.
By WALTER S. BRUCE,
General Agent.

Approved April 8, 1919.
SULLIVAN & SULLIVAN,
JAMES R. BOTHWELL,
Attorneys for Plaintiffs.

Filed April 8, 1919.
W. D. McREYNOLDS,
Clerk.

(Title of Court and Cause.)

Amendment to Answer of Twin Falls Salmon River Land and Water Company.

Now comes the defendant Twin Falls Salmon River Land & Water Company, by leave of Court first had and obtained, and amends its answer herein by interlineation as follows:

By adding after paragraph 35 of said answer and above what is denominated a "Cross-Bill" the following:

36.

Further answering complainant's amended bill, this defendant says that prior to the execution of said contract (Exhibit
16 "A" to complainant's bill) between said State of Idaho and this defendant, the State of Idaho had made application to the Secretary of the Interior, as required by said Act of Congress commonly known as the Carey Act, and had filed a map of said land proposed to be irrigated exhibiting a plan showing the mode of the contemplated irrigation and showing the source of the water to be used for irrigation and reclamation, and which map and plan of irrigation had been duly approved by the Secretary of the Interior and the lands referred to in complainant's amended bill segregated from the public domain for reclamation under said Act of Congress and by the plan of irrigation and from the source of water supply described in said State contract (Exhibit "A"). That in approving said plan of irrigation and segregating said lands from the public domain the Secretary of the Interior did adjudge and determine the sufficiency of the water supply and the feasibility of said irrigation system and plan of irrigation, and the feasibility thereof and sufficiency of said water supply had likewise been determined, adjudged and approved by the said State of Idaho, and such determinations were made, as aforesaid, prior to the execution of said State contract by this defendant. And this defendant is informed and believes, and so alleges the fact to be, that the determinations so made by the Secretary of the Interior and the State
17 of Idaho are final and conclusive, and are binding upon said State and said Secretary.

37.

Further answering complainant's amended bill, this defendant says that by the terms of its said contract with the State of Idaho it was obliged to issue water contracts and contract to sell shares in said irrigation system to all perons who were by said State permitted to make entries upon said Carey Act lands and to owners of other lands susceptible of irrigation from said irrigation system; and this defendant, in good faith and believing there was sufficient water

available to irrigate said lands for which water rights or shares in said irrigation system were sold, and relying upon the determinations so made by the Secretary of the Interior and the State of Idaho approving the feasibility of said irrigation system and the sufficiency of the water supply, did execute water contracts and sell shares or interests in said irrigation system for approximately 73,000 acres of land situated under said irrigation system, all of which said water contracts were approved by the State Board of Land Commissioners of the State of Idaho before the same became effective or were delivered to the purchasers of such shares or water rights; and that in the event it be found or determined that the water supply available for said irrigation system is insufficient to reclaim all the lands for which contracts were executed by this defendant and approved by said State Board of Land Commissioners, this defendant
18 alleges that under the terms of the said Act of Congress and the laws of the State of Idaho and the said State and settlers' contracts the purchasers of such water rights or shares in said irrigation system prior to the available water supply having been exhausted acquired an undivided and proportionate interest in said irrigation system and water supply sufficient to entitle such land owners to patent to the lands entered by them respectively, but all contracts or shares issued after such available supply had been exhausted would be unauthorized and void under said Act of Congress; and this defendant alleges that by virtue of the provisions of the second clause of Article 6 and the second clause of Section 3 of Article 4 of the Constitution of the United States the said Carey Act and the amendments thereof are the supreme law of the land with respect to the reclamation of lands in said project, and prescribe the conditions upon which title to said lands shall pass from the United States and the amount of water that shall be applied to or made available for said lands before the same may be segregated from the public domain or title thereto passed from the United States, and no act may lawfully be done nor contract entered into to prevent the accomplishment of the purposes of said laws or the issuance of patent to land so segregated from the public domain under said Act after such segregation has been made, or to impair or defeat the
19 lien of this defendant on such lands. And this defendant especially sets up and claims the right under said Act of Congress and its amendments to apply the available water supply to all the land in said project which may be reclaimed from such supply, and to a lien on such lands so reclaimed for the cost of said irrigation works, and to so use and apply said available water supply to the reclamation of lands in said project as to effectually accomplish the objects and purposes of said Carey Act and the amendments thereto.

S. H. HAYS,
Solicitor for Defendant Twin Falls Salmon River Land & Water Company.

Residence: Boise, Idaho.

Filed June 30, 1919.
W. D. McREYNOLDS,
Clerk,
By PEARL E. ZANGER,
Deputy.

(Title of Court and Cause.)

Amendment to Answer of Defendant Commonwealth Trust Company of Pittsburgh and to Answer of Defendant A. C. Robinson.

Come now the defendants Commonwealth Trust Company of Pittsburgh, Trustee, and A. C. Robinson, by leave of Court first had and obtained, and amend their answers herein by interlineation as follows:

By inserting in the answer of Commonwealth Trust Company of Pittsburgh, Trustee, after paragraph 27 of said answer and after paragraph 2 of the answer of the defendant A. C. Robinson the following:

(*a*) Further answering complainant's amended bill, this defendant says that prior to the execution of said contract (Exhibit "A" to complainant's bill) between said State of Idaho and the defendant Twin Falls Salmon River Land & Water Company, the State of Idaho had made application to the Secretary of the Interior, as required by said Act of Congress commonly known as the Carey Act, and had filed a map of said land proposed to be irrigated exhibiting a plan showing the mode of the contemplated irrigation and showing the source of the water to be used for irrigation and reclamation, and which map and plan of irrigation had been duly approved by the Secretary of the Interior and the lands referred to in complainant's amended bill segregated from the public domain for reclamation under said Act of Congress and by the plan of irrigation and from the source of water supply described in said State contract (Exhibit "A"). That in approving said plan of irrigation and segregating said lands from the public domain the Secretary of the Interior did adjudge and determine the sufficiency of the water supply and the feasibility of said irrigation system and plan of irrigation, and the feasibility thereof and sufficiency of said water supply had likewise been determined, adjudged, and approved by the said State of Idaho, and such determinations were made, as aforesaid, prior to the execution of said State contract by said Twin Falls Salmon River Land & Water Company. And this defendant is informed and believes, and so alleges the fact to be, that the determinations so made by the Secretary of the Interior and the State of Idaho are final and conclusive, and are binding upon said State and said Secretary.

(*b*) Further answering complainant's amended bill, this defendant says that by the terms of said contract with the State of Idaho the said Twin Falls Salmon River Land & Water

Company was obliged to issue water contracts and contract to sell shares in said irrigation system to all persons who were by said State permitted to make entries upon said Carey Acts lands and to owners of other lands susceptible of irrigation from said irrigation system; and said Twin Falls Salmon River Land & Water Company, in good faith and believing there was sufficient water available to irrigate said lands for which water rights or shares in said irrigation system were sold, and relying upon the determinations so made by the Secretary of the Interior and the State of Idaho approving the feasibility of said irrigation system and the sufficiency of the water supply, did execute water contracts and sell shares or interests in said irrigation system for approximately 73,000 acres of land situated under said irrigation system, all of which said
22 water contracts were approved by the State Board of Land Commissioners of the State of Idaho before the same became effective or were delivered to the purchasers of such shares or water rights; and in the event it be found or determined that the water supply available for said irrigation system is insufficient to reclaim all the lands for which contracts were executed by said Twin Falls Salmon River Land & Water Company and approved by said State Board of Land Commissioners, this defendant alleges upon its information and *believe* that under the terms of said Act of Congress and the laws of the State of Idaho and the said State and settlers' contracts the purchasers of such water rights or shares in said irrigation system, prior to the available water supply having been exhausted, acquired an undivided and proportionate interest in said irrigation system and water supply sufficient to entitle such land owners to patent to the lands entered by them respectively, but all contracts or shares issued after such available supply had been exhausted would be unauthorized and void under said Act of Congress; and this defendant alleges that by virtue of the provisions of the second clause of Article 6 and the second clause of Section 3 of Article 4 of the Constitution of the United States the said Carey Act and the amendments thereof are the supreme law of the land with respect to the reclamation of lands in said project, and prescribe the conditions upon which title to said lands shall pass from the
23 United States and the amount of water that shall be applied to or made available for said lands before the same may be segregated from the public domain or title thereto passed from the United States, and no act may lawfully be done nor contract entered into to prevent the accomplishment of the purposes of said laws or the issuance of patent to land so segregated from the public domain under said Act after such segregation has been made, or to impair or defeat the lien of such water contracts on such lands. And this defendant especially sets up and claims the right under said Act of Congress and its amendments to have the available water supply applied to all lands in said project which may be reclaimed from such supply (and to a lien on such lands so reclaimed for the cost of said irrigation works in accordance with the terms of the contracts so held or deposited with this defendant as hereinbefore set forth, and to have the available water supply so used and applied to the reclama-

tion of the lands in said project as to effectually accomplish the objects and purposes of said Act and the amendments thereto, and so as to make the lien of all such water contracts as were entered into prior to the time that the available water supply was so exhausted effectual and enforceable against the lands and water rights in such contracts described.

24 RICHARDS & HAGA,
Solicitors for Defendants Commonwealth Trust Company of Pittsburgh, Trustee, and A. C. Robinson.

Residence: Boise, Idaho.

Filed June 30, 1919.
W. D. McREYNOLDS,
Clerk,
By PEARL E. ZANGER,
Deputy.

(Title of Court and Cause.)

Supplemental Answer of Defendants.

Now come the above named defendants, by leave of Court first had and obtained, and file this their supplemental answer to the amended bill of complaint of the complainants herein, and allege:

I.

That since the commencement of the above entitled suit and since the filing of the answers filed by these defendants respectively herein, and to-wit: on the 11th day of November, 1916, the State Board of Land Commissioners of the State of Idaho did make and enter an order in the minutes of said Board cancelling a large number of entries made by entrymen under the Carey Act on lands situated under the said Salmon River Project, to-wit: approximately 187 entries and embracing an acreage of approximately 13,000
25 acres; that the cancellation of said entries was made by said Board after notice given to the entrymen as required by the laws of the State of Idaho and rules and regulations of said Board, and such entries were duly cancelled by said Board for failure of the entrymen to make final proof on their respective entries within the time required by law. That by the cancellation of said entries the number of acres entitled to water from said Salmon River Irrigation System was reduced to 60,170.8 acres.

II.

That thereafter and to-wit: on the 18th day of October, 1917, said State Board of Land Commissioners did make and enter an order with reference to the acreage to be irrigated from said Salmon River Project, which order, among other things, provided that:

"The total irrigable acres in the Salmon River Twin Falls Carey Act Project shall not exceed 35,000 irrigable acres within the project, and that the State Land Board will not apply to the Federal Government for patents to lands within the project which, added to any lands already patented, or State lands heretofore sold, or Desert Entries which may remain within the project, will make a total acreage receiving water from the irrigation system and within the project of over 35,000 acres."

That said order contemplated the reduction of said project to 35,000 net irrigable acres, or a gross acreage of approximately 39,-
000 acres, including non-irrigable land embraced within en-
26 tries approved for patent; and said order contemplated that approximately 21,000 acres out of the 60,170.8 acres then embraced within outstanding water contracts under said project should be excluded from said project and relinquished to the United States and should not be patented to the State of Idaho for irrigation from said irrigation system.

III.

That thereafter and on the 4th day of February, 1918, said State Board of Land Commissioners adopted the following resolution with reference to the exclusion of said 21,000 acres of land from said irrigation project:

"Whereas, This Board has heretofore, by and with the consent of the Commissioner of the General Land Office of the United States, determined upon the number of acres which it will request patent from the United States for and which will be included in either the Twin Falls Salmon River Carey Act Project or the Twin Falls Oakley Carey Act Project;

"And, whereas, the reduction of the said projects to the number of acres heretofore indicated by this Board will result in the exclusion of certain individuals, together with their filings, from the said projects, which will result in a depreciation of the value of the improvements placed upon their respective entries to the point of confiscation of such improvements;

"Therefore, be it resolved, That a committee of one be appointed for each of said projects to assess and determine the value of im-
provements placed upon all such excluded entries, and re-
27 port the same to this Board, giving legal subdivisions of land and the name of the entryman with items and character or value of improvements upon such entries; also indicating whether the entrymen at the date of said report was a bona fide resident of the State of Idaho residing upon the entry, or was absent therefrom, or was not a resident of the State of Idaho and was absent therefrom, and that the Land Board transmit such report to the next Legislature for their consideration."

That pursuant to said resolution said State Board of Land Commissioners appointed one C. W. Whiffin as the agent or representative of said Board to select the lands under said project which should be

included in the application for patent and which the said Board intended should be entitled to water from said irrigation system, and also to determine what lands should be excluded from said irrigation system and the value of the improvements as contemplated by the foregoing resolution.

IV.

That thereafter, to-wit: on the 13th day of March, 1918, the Board considered the report of said C. W. Whiffin, and after duly considering the same and entered an order in the form of a resolution, ordering and directing the Governor of the State of Idaho as Chairman of said Board and the Register as Secretary of said Board to make application to the United States Government for patent for certain designated lands under said Salmon River Project, making in the aggregate a net irrigable acreage of about 35,-
28 000 acres and a gross acreage of about 39,000 acres, a copy of which said resolution and order is hereto attached, marked Exhibit "A" and made a part hereof; and said Chairman and Secretary of said Board, pursuant to said resolution and order, did thereafter make application to the United States for patent for said 39,000 acres of land.

V.

That thereafter and on the 15th day of November, 1918, the said State Board of Land Commissioners did make and enter an order in its minutes, of which the following (omitting the description of the lands) is a true copy:

"List of lands under the Twin Falls Salmon River Land & Water Company's project on which proof has been made but not included in list for which patent has been requested was presented to the Board; whereupon the following resolution introduced by Attorney General Walters was unanimously adopted:

"Whereas, This Board with the concurrence of the Department of the Interior has heretofore resolved to apply for patent for lands in the sum of 35,000 acres under the Twin Falls Salmon River Land & Water Company's project, and

"Whereas, The following described lands and entries have heretofore offered final proof, which has been accepted by this Board, and

"Whereas, The same is not included in the above mentioned 35,-000 acres;

"Now, therefore, be it resolved, That this Board will not
29 apply to the United States Government for patent to the State of Idaho for any of the following described land:"

That the lands described in the foregoing resolution and order and for which the State resolved not to apply for patent aggregate about 21,000 acres; and the lands in this answer referred to, viz., the 13,000 acres on which the Carey Act entries were cancelled by order of said Board on November 11, 1916, and the 21,000 acres which said Board ordered and directed should not be entitled to water from

said irrigation system and for which it declined to apply for patent, and the 39,000 acres (35,000 net irrigable acres) for which said Board determined to apply for patent, embrace all the lands referred to in plaintiffs' amended bill of complaint and which it is therein alleged are entitled to water from said irrigation system, and for which it is claimed patent will not issue by the Federal Government.

VI.

That the Department of the Interior has determined and agreed with such State Board of Land Commissioners, as these defendants are informed and believe and so allege the fact to be, to issue patent to the State of Idaho for the 39,000 acres of land for which said Board resolved to apply for patent and for which said Board has applied for patent, as aforesaid.

30

VII.

That some of said plaintiffs own land for which the State has applied for patent as aforesaid, and others of said plaintiffs held entries which said State Board of Land Commissioners have included in said 21,000 acres for which water shall not be delivered and for which the State will not apply for patent, and by reason of the facts herein set forth and the actions of said State Board of Land Commissioners and the Department of the Interior of the United States the said plaintiffs do not, nor does any of them, represent a class having a common or general interest in the questions presented for determination by said bill; that the rights and liabilities of plaintiffs and the persons whom plaintiffs claim to represent in said suit are not identical nor substantially similar, but the rights and interests of plaintiffs and the other persons whom they claim to represent conflict in many respects, and the questions involved in said suit are of such a character that one or more may not sue for the whole or for all settlers or owners of water rights in said irrigation system.

Wherefore, Defendants pray that complainant's amended bill of complaint may be dismissed, with costs to these defendants.

S. H. HAYS,
Solicitor for Twin Falls Salmon River Land & Water Company.

31

P. B. CARTER,
Solicitor for Salmon River Canal Company, Limited.

RICHARDS & HAGA,
Solicitors for Commonwealth Trust Company of Pittsburgh, Trustee, and A. C. Robinson.

(Exhibit "A" Excluded.)

Filed June 30, 1919.
W. D. McREYNOLDS,
Clerk,
By PEARL E. ZANGER,
Deputy.

(Title of Court and Cause.)

Statement of Evidence on Second Trial under Equity Rule No. 75.

Be it remembered, that this cause came regularly on for trial before the Court sitting in equity on March 24, 1919, on the amended bill of complaint of the plaintiffs and the answers of Commonwealth Trust Company of Pittsburgh and A. C. Robinson and the amended answer and cross-bill of the Twin Falls Salmon River Land & Water Company and the Salmon River Canal Company and the petition in intervention of Robert Rayl et al., and the owner of defendants thereto and upon the mandate of the Circuit Court of Appeals of the Ninth Circuit in this cause, Messrs. Sullivan & Sullivan and James R. Bothwell, Esq., appearing for the plaintiffs, Turner K.
32 Hackman, Esq., appearing for intervenors, and Messrs. Richards & Haga, S. H. Hays, Esq., and Albert N. Edwards, Esq., appearing for defendants.

Whereupon, the following proceedings were had:

Mr. Bothwell: I presume it will be proper at this time, if the Court please, to make a statement as to our view of what is now before the Court, or what may be considered by the Court.

The Court: Yes, very briefly.

Mr. Bothwell: It is our contention that the contract as it has been interpreted by the Circuit Court of Appeals provides that one one-hundredth of a cubic foot of water per second per acre is the water right, delivered during the irrigation season, which the construction company agreed to sell to the settlers; that is, if the settler requires that amount of water. That requires an investigation as to what the duty of water is on the tract. That will be the question which we believed we should present to the Court at this time. The other question is the appointment of a Receiver by the Court to take charge of the moneys which are to be recovered by the Trustee, first, because it is apparent from the record that the tract must be reduced. The Receiver must be appointed by the Court in order to collect these funds, to make such application as the Court may determine. Whether in this suit or whether in a later suit, whether the Court shall direct the Receiver to institute a proper action to bring
33 in all parties at a later date, and if the interests appear to be adverse, or whether the Court shall determine at this time as to what the respective rights are, a Receiver must be appointed for that purpose.

Second, the Commissioner of the General Land Office, the State Board of Land Commissioners of this State, have had a hearing upon the questions which are before the Court at the present time, as to the acreage which this water will irrigate. It is here in this decision from the Circuit Court of Appeals that that is a question primarily, or that it is a question, I believe it says, in the absence of fraud,—it doesn't add that, but it would be, under the construction placed upon this contract by that decision, it would be a question for the Commissioner of the General Land Office to determine the patentable area

or the land which could be irrigated, or reclaimed from this water right which was filed upon by the construction company. That question they have determined, the Commissioner of the Department of the Interior and the Land Board. Now, it is the duty of this Court to appoint a Receiver to take charge of the funds which will be derived from the land which is to be patented, in order to remunerate the lands and those who are left without the area for which patent will issue, for this reason: those who are without that area have an equitable lien upon the water which they have cared for for the past six or eight or ten years. The action of the construc-
34 tion company in entering into a contract or contracting to sell more water than it had was an act which in effect abandoned the use of the water which has been applied to this area on the outside, and those who have utilized that water, who have saved that right for the Trustee and the Land & Water Company, should have an equitable lien upon that water when it now is transferred to lands where it belongs, which would remunerate those who have expended their funds in preserving this property for the Land & Water Company and for the settlers who are to get the benefit of it. Otherwise the appropriation would have been lost. A receiver is also necessary to complete the system.

We submit that those are the facts which will be before the Court, and we will offer proof in support of that.

Whereupon G. M. HALL was called as a witness on behalf of plaintiffs, and being duly sworn, testified upon direct and cross-examination as follows:

My name is G. M. Hall. I reside at Hollister, Idaho, and am General Manager of the Twin Falls Salmon River Land & Water Company and President of the Salmon River Canal Company. I have been engaged in *teh* distribution of water under the Salmon River system directly and indirectly since June, 1914. The distribution has always been directly with the Superintendent of the Canal Com-
pany. When I came to the project in 1914, I think the plan
35 was at that time to deliver what was termed a contract head, or at the rate of 1/100 second foot per acre, although very often a much larger head than that was delivered. I think water at that time was run in periods, the same as it has been since. In, I think, 1915 the distribution was broadened, or the heads were enlarged so as to give what was thought to be more effective and efficient delivery, delivering from a head and a half to a double head during the period that water was being run. That was the practice, that has been the practice for the last four seasons.

I think that is the most economical system of delivery which can be adopted on the project. I have the record of the amount of water per acre delivered to the settlers since 1914. In 1914, delivered at the settlers' measuring weir, 2.46 acre feet. In 1915, 8.7 acre inches. In 1916, 1.45 acre feet for the acreage in crop. In 1917, 2.54 acre feet for the acreage in crop. In 1918, 1.23 acre feet. The acreage in crop was as follows: In 1914, 30,064 acres. In 1915, 37,303. In

1916, 39,160. In 1917, 38,500. For 1918, no crop census was taken, but I think the canal superintendent can give those figures approximately correct. I would say that they were around 40,000 acres.

I was employed during this period by the Twin Falls Salmon River Land & Water Company and Salmon River Canal
36 Company. Mr. A. C. Robinson was President of the Land & Water Company at the time I was employed and has been ever since. The stockholders are in control of the Land & Water Company. I have been acquainted with Mr. Robinson since March, 1914. I am acquainted with the other members of the Bondholders' Protective Committee. They are Messrs. G. L. Edwards and J. H. Puelicher. Mr. Edwards lives in St. Louis and Mr. Puelicher in Milwaukee. I opened negotiations with these gentlemen as to my employment in March, 1914.

Whereupon the witness was asked: "Where did this take place?" To which counsel for defendants objected as irrelevant and immaterial and said objection was overruled and an exception allowed. The witness answered, "In Pueblo, Colorado."

The testimony of the witness continued as follows:

I would like to correct my answer. I never opened negotiations with those gentlemen in connection with my employment. My negotiation was with Mr. A. C. Robinson entirely. I met Mr. Robinson and had no negotiations with Mr. Puelicher or Mr. George L. Edwards. I don't recollect that anything was said about the Bondholders' Committee. I was employed by Mr. A. C. Robinson, a contract was made by me for my services with him as President of the Twin Falls Salmon River Land & Water Company. I don't
37 think at that time I knew he was chairman of the Bondholders' Protective Committee. I probably learned that fact in the last few months, at any rate, after I had come to Hollister and taken up my residence there. I don't think at the time the arrangement was concluded that I knew very much about the Idaho project. Mr. Robinson came to me through a man in Colorado whose endorsement of Mr. Robinson was sufficient to satisfy me as to the responsibility of the party that I made the contract with. I never had any business with these gentlemen as a Bondholders' Protective Committee at any time.

As I became more familiar with the conditions I learned that there was a committee representing the bondholders of the different Kuhn projects, the Oakley, the North Side, and the Salmon. I learned that from a meeting at Milner, where I saw those men, some of them. At that time I met Mr. Puelicher. I don't remember whether I met Mr. Edwards then or not,—and others of that general committee,—but I had no negotiations with them, nor I wasn't called into conference at the sittings of the committee. I was there at Milner for the purpose of doing business with the Salmon people, not with them as a bondholders' committee at all. At that time I dealt with Mr. Peulicher and Mr. MacWatters, the General Manager

of all the Kuhn interests in Idaho. Mr. Robinson was not there at that time.

38 I attended a meeting in Chicago, I think, two years ago,—it might have been three years ago,—no—It's two years ago,—at which Mr. Robinson was present, Mr. Edwards, Mr. Puelicher,—no, Mr. Edwards was not present,—Mr. Peulicher and Mr. Durste, of Minneapolis, and perhaps—a member of the committee having the Sacramento project. Part of the time Salmon matters were under consideration, and part of the time other matters were.

I never received any direction at any time from the Committee. It has always been from Mr. Robinson. I was there in Chicago at the request of Mr. Robinson to attend a conference in regard to the Salmon project. They desired information with reference to the Salmon project and I gave it to them. They gave me no instructions concerning the Salmon project. The features that were principally discussed were the proper conduct for the defense of suits that were being brought against the Salmon Company. I don't think the approval or rejection of what I told them was discussed. The only thing of that nature was a statement made to me by Mr. Robinson, that he had no suggestions to make as to the conduct of the affairs of the Salmon project, that I was there, and he said to go along as we had been doing.

A portion of my salary comes from the Twin Falls Salmon River Land & Water Company and a portion from the Salmon

39 River Canal Company. The offices of the Salmon River Land & Water Company are in Pittsburgh. The office in Idaho is a branch office. We have no knowledge of the general books or affairs of that company. All I know is that I receive a voucher from Pittsburgh signed by Mr. A. C. Robinson, as President of the Twin Falls Salmon River Land & Water Company, and I get the money on it.

I wouldn't think necessarily so. At the time I came to Idaho there was a representative in Idaho who was recognized, a man who was recognized as a representative of the bondholders, Mr. Green. I had a general knowledge that there was such a thing as a committee representing the holders of the bonds, that they had been obliged to organize to protect their interests, Mr. Green was never in charge of the project, nor did he have anything to do with it. I came out and I was put in charge of it.

I made a statement some thirty days ago before the Land board that the bondholders didn't have any more money to put into the check basin, or words to that effect. The source of my information was advices from Mr. Robinson, as President of the Land & Water Company, or from Mr. A. C. Robinson, without saying what his title was, but all the communication from Mr. Robinson to me are as President of the Land & Water Company.

I am Vice-President and General Manager of the Land & Water Company and President of the Canal Company. I have never

40 made any examination of the assets of the Land & Water Company. I hold one share of stock in that company. I do

not know who voted to elect me Vice-President of the Land & Water Company. I received the information that I was Vice President of that company along in the summer in 1914 in a letter from Mr. A. C. Robinson, president. The Canal Company elects a superintendent. I vote the stock of the Canal Company. Under proxy from the trustee, I vote some 53,000 shares. The shares are assigned to the trustee and held as collateral. The Commonwealth Trust Company of Pittsburgh is trustee. They send me a proxy with authority to vote the shares. Nobody directs me how to vote them. I determine how to vote them by using my judgment. I do not take that matter up with Mr. Robinson or any of the other members of the Bondholders' Protective Committee. I think about 30 or 40 shares in addition to those I vote are voted. Some are voted by the Secretary, some by individuals.

I succeeded D. C. MacWatters as Vice-President and General Manager of the Land & Water Company. The records of the office show that he had held that position for several years. The main office of the Land & Water Company, where its stock books and minutes of meetings of the directors and stockholders are kept is in the east. I have never attended any of the meetings of the stockholders or directors. The information I receive as to who are
41 the officers comes from Mr. Robinson. That has been true during all of the years I have been an officer of the company.

Why, once in a while some representative of some one holding a block of bonds comes out to the project and asks to know how the project is getting along, and I give them what information I can as to the general situation. I make no reports to Mr. Peulicher or Mr. Edwards. They have never asked for any. I don't know whether Mr. Peulich*ed* has been there since I have or not. I don't think I ever saw Mr. Peulicher on the Salmon project. Mr. Edwards has been there, I think possibly twice, perhaps once. I have no personal knowledge of who constitutes the Bondholders' Committee. I have information just the same as we know things we read in the newspapers. I think the so-called Bondholders' Committee is composed of a large number of members and the men I have referred to are only a few of them. There are some 12 or 15 men on the committee of whom I have personally met or seen, 4 or 5.

In 1914 when I went on the project there were some negotiations of settlement pending with the farmers and for that reason the Bondholders' Committee, or their representatives, were represented on the project. Early in 1914 negotiations were on, and they were on in March, 1914, and I might say have been continued in an intermittent way ever since. These negotiations were of such char-
42 acter that the bondholders would have to participate as their interests were involved. It was in that capacity that Mr. Green was on the project. I think that has been the occasion for Mr. Edwards being out on the project. He negotiated with a committee in Twin Falls. I was not present, wasn't asked to be, had nothing—all I knew of it was what Mr. Edwards told me casually afterwards, told me afterwards.

I did not represent the bondholders or the bondholders' committee

in negotiating with the settlers and was not present in the conference. I was at Milner in 1914 to get information. That was the office of the Land & Water Company. It was moved to Hollister in the late summer or fall of 1914. Mr. Puelicher and others of the general committee happened to be there.

There has been a reduction in acreage covered by outstanding water contracts on the Salmon project since 1914. A little over 13,000 acres has been eliminated. Deliveries of water have been made to settlers by rotation or by periods. That has been in the interest of efficiency and better service to the farmers. There has been no discrimination in water deliveries. Distribution is made according to the number of shares that a person owns in the Canal Company, giving each settler his proportionate share or part of the water.

43 I got my information as to the members of the Bondholders' Committee mostly from Mr. Green, who was on the tract or in Twin Falls when I came out in June, 1914, and also from meeting some men in Denver who I was told belonged to the committee. This was before my employment. I didn't know at any time that the bondholders were in charge of the project. I knew there was a committee representing the holders of bonds of the several Kuhn projects. I knew that Mr. Green was representing their interests which were involved in an adjustment with the settlers, or I would say that Mr. Green called himself Mr. Robinson's personal representative. I knew that Mr. Robinson was reported to have been out here early in 1914 negotiating. The bondholders' interests were involved because it was reported that the interest on the bonds was in default. The Land & Water Company could not pay the interest, as I understand it. I know that the revenue from the collections from debtors to the company has been very limited in the last four years. I know as a matter of fact that the settlers haven't paid their water contracts. The Land & Water Company has received no funds from Idaho. I had a circular or pamphlet in my possession on February 6, 1918, from the Bondholders' Protective Committee, giving information. I don't remember its date or what it contained. On that date I informed Mr. Beauchamp as to the names of the bondholders on the various Kuhn projects,

44 naming Robinson, Edwards and Puelicher as the committee that was in charge of the Salmon project.

I will qualify that answer. I don't know that I ever told him or anybody else that they were in charge of the project. I told him those were the names of the bondholders' committee representing holders of bonds of the Salmon project.

This 13,000 acres that was eliminated was land for which contracts had been issued. The entries were cancelled by the Land Board after notice requiring the parties to make proof. When they failed to make their proofs the Board cancelled a number of entries on which the contract acreage was something over 13,000. Contracts are now outstanding for 60,170.8 acres.

The water has been delivered by rotation or periods. I think I would say both. The water has been run in periods, there has been

periodic deliveries or rotated between the reservoir and the entire system, and instead of delivering it at what is commonly called contract head of one 1/100, the deliveries have been at a better rate of flow and for such period as there was a general demand and the crops required the water. One reason for this method is, greater efficiency on the land, because a small head results in a larger per cent of loss in getting the water through the laterals and through the corrugations, a saving in labor in applying the water, because it gives the user a head in proportion to his ability to care for it, instead of wasting time with a small head, smaller system losses, because of shortening of the time that the canals and main laterals are subject to seepage losses. Those are the three principal advantages of periodic delivery. And then another, that it permits of a more timely application of the water to the crops, because of the over-size or the—not over-size—the extra size of the canals and laterals on the project, it is possible to make deliveries at a very much larger head than was contemplated when the project was planned, which is a great advantage to the water users, because the water is applied at the time the crops need it. The extra size of the ditches is of great advantage to the water users. On this account we are able to make these periodic deliveries.

In answer to questions by the Court the witness testified as follows:

A share of stock was given to me in each one of the companies to qualify me to hold office. I couldn't say as to who gave me the share in the Land & Water Company, but the share in the Salmon River Canal Company was transferred to me by A. C. Robinson. I paid nothing for either one. I am President of the Canal Company, the operating company. The superintendent of the canal is its manager. The superintendent is elected by the Board of Directors. I vote the majority of the stock and thus select the board. I vote this stock by virtue of the proxy I receive from the trustee. When the contract was made the canal stock was put up as collateral. I had no real interest in the company. I never received any specific instructions, but when I hold that proxy I undertake in good faith to vote the interests of the trustee. I wouldn't accept a proxy unless I did that. When I select members of the board, I select men who will vote for what I consider the true interests of the project and for the employment of the best employees and agents and to give the most efficient management of the Canal Company.

I do not participate in the management of the affairs of the Land & Water company. I take my directions exclusively from Mr. Robinson. He is President of the company. I never stopped to inquire what authority he had to direct me. I took his word for that. All I know about it is what Mr. Robinson has written me. My information comes through him in the forms of letters or when I see him. We have letters frequently from the Treasurer of the Land & Water Company and from the Secretary and the Vice-President. I am the second or third Vice-President. There are a number of the

water users or settlers on the project who are members of the Board of Directors of the Canal Company. They have declined to accept the position. I think Mr. Edwards asked representatives of the settlers to nominate three men. I think I talked with Mr. Mikesell,
who is an officer of the Settlers' Association and Mr. Douglas.
47 I am not sure whether I talked with others or not. Mr. Douglas and Mr. Mikesell declined to serve as directors. I don't remember that they gave any reason for not wanting to serve on the Canal Company at that time. At another time they gave as a reason that they do not want to assume any responsibility for the operation of the Canal Company for the operation of the project. This conversation with Mr. Mikesell took place shortly following Mr. Edwards' conference with the settlers and a meeting in Longley's office, of the Directors of the Settlers' Association Board and a number of other settlers, at which I was present. I think it was in the fall of 1916. No one directed me to talk to Mr. Mikesell about it. Mr. Edwards told me of his request to the settlers' committee that they select three men for Directors on the canal board. There are nine members of the Board.

Mr. Edwards was working to effect a compromise or reach a settlement with the settlers on that project, and believed that the representation of the set-lers of the board would be advantageous and beneficial to everybody. He came as a representative of the bondholders. I had a conversation with Mr. Douglas along about the same time. I think Mikesell's reply was about to this effect, that the matter had been discussed and it had been decided not to participate in the management of the Canal Company, it had been decided that such
steps were not advisable. I intended if he should accept to
48 vote for him as director. I intended to vote for three men that would be nominated by the settlers, whether it was Mr. Douglas or Mr. Mikesell, or whoever they might pick on. I don't know that I can remember who were the directors at that time. Mr. Champlin, the Secretary of the company, was one. I don't remember—I can't recall whether Mr. Ward was one at that time or not. I think Mr. Drake (?) and myself, and I don't remember who the others were. Mr. Robinson was one of the directors.

Mr. Puelicher and Mr. Edwards have never been on the Canal Board. None of the bondholders, besides Mr. Robinson, were members of the Canal Board. I can't remember what Mr. Douglas said when I talked to him. My recollection—it was the same general conversation—I don't know whether the talk was limited to talking with Mr. Douglass and Mr. Mikesell. The decision was reached that the settlers should not go on the Board at a meeting of the Directors of the Settlers' Association, at which there were several settlers present who were not on the board. Mr. Edwards was not at this meeting. That was after he had gone back.

J. C. PORTERFIELD, being produced as a witness on behalf of plaintiffs, upon being duly sworn, testified as follows on direct and cross examination:

My name is J. C. Porterfield, residence, Twin Falls. I am superintendent of the Salmon River Canal Company. I have
49 been so employed since the first of January, 1918. I have had, so far as construction work is concerned in connection with the work, in the way of maintenance work, probably fifteen years' experience, maybe twenty; I couldn't say exactly,—fifteen years at any rate,—in general construction work, in irrigation projects. So far as the handling of water is concerned during the irrigation season for irrigation purposes, three years on the South Side Twin Falls Project. I have made an examination of what is termed the check basin on the Salmon River Project and made a report on it to the Canal Company.

Whereupon, the following proceedings were had:

Question by Mr. Bothwell: "What did you find to be the objectional features of that check basin as it is at present?"

Mr. Haga: If the Court please, I don't see what bearing that has on the issue in this case.

The Court: What is the materiality of it?

Mr. Bothwell: The question is this, if the Court please. It is our contention that a Receiver must be appointed in this case to take charge of this system, to complete the system, to complete this check basin. We expect to develop from this witness that the check basin was built, or rather land was utilized there which was very unsafe, and has now required a great amount of money to be expended, and that they are in the process of doing this construction work at the present time. The record already shows that the bondholders
50 have made the statement that they haven't got the money to do it. We expect to show further that they have made an attempt to charge this to maintenance for this year, that there is an action pending to determine that question, and that they have so far proceeded with the work that the entire system is imperiled down there, that is through this check basin. We expect to show by this witness that they have taken off what little dirt there is over the lava rock there and built up a ridge down through the basin of a few feet high, and that it is impossible to use the system as it is at the present time. That the bondholders have refused to put up the money for it, that it is a construction charge, and that they have attempted to make it a maintenance charge, and therefore we insist that a receiver is required to take charge of the project; also that this will find more water. We expect this witness to testify that there is an excessive loss of water in this check basin as it is presently constructed, that more land can be brought under cultivation providing this is done. We also expect to show that the parties who are now in charge of this system have adopted the advice of the Commissioner of the General Land Office, in which he stated that this improvement should be made, that the check basin, the losses in the check basin should be overcome, and that he would patent an area of 35,000 irrigable acres. That they have started to proceed in ac-
51 cordance with that, but in place of fulfilling their original view or intention, that they have now sought to charge it

against the settlers as maintenance; that it is not a maintenance charge, but purely a construction charge, and that unless a Receiver is appointed to take charge of the system and go ahead and complete this work, that there is very grave danger of no water being delivered this year and the entire system being imperilled, and that in last year's maintenance charges, which were charged against the settlers they appropriated $7,000.00 in cash and issued $2,000.00 in certificates of last year's maintenance, which they have used to build this little ridge through the check basin, and it now stands in that condition. They were without funds themselves to do that. At least they didn't use their own funds for it.

Further argument omitted.

The Court: Of course this evidence might have some bearing upon the question of the appointment of a Receiver. I can't see its materiality to the ultimate issues. I wasn't aware that you were making application for a Receiver at the present time.

Mr. Bothwell: Well, we are urging, if the Court please, the appointment of a Receiver, in conformity with the prayer and with the bill of complaint, in addition to the question as to the duty of water and the question of injunction, enjoining proceedings. That is one of the principal reliefs asked for in the original suit,
52 and of course we have not abandoned that position.

The Court: The difficulty about it is, you are going into the conditions which didn't exist at the time the suit was commenced, or at the time of the former hearing, as I understand. You are going into a present condition. I think there was some testimony touching this catch basin, as it is called, at the former hearing. I don't remember just what bearing it had, but I remember it as a feature of the canal. At least at some of the hearings here that feature has been brought to my attention.

The Court: Well, I think I shall overrule the objection.

The witness continued as follows:

The principal objection was the element of hazard that entered into operating the check basin as it then existed.

The check basin originally covered approximately ninety acres, its maximum use, that is, during the peak of the irrigation season, when the water surface was at its extreme height, and in one particular locality of the check basin the bottom was treacherous, and large holes had at one time developed and been diked off, so that that particular locality was no longer a part of the check basin. But still in that immediate vicinity there were holes occasionally developing, and there was considerable anxiety in connection
53 with operating the check basin, due to the fear that other holes would develop during the period of irrigation that would require shutting down the system at a time when the water would be needed very seriously, and any shut-down of the system might work distaster to the — than necessary for the operation as a regulating basin, which it fills, to some extent, to a considerable extent, holding the water in a comparatively quiet stage for the regulation by the

gates at a point about three-quarters of a mile below the check basin itself. This, of course, exposed an unnecessarily large amount of ground to ordinary seepage losses, which can be determined with some fair degree of accuracy, and are about the same thing for most any earth conduit; also a large surface to evaporation, unnecessarily large. The main objection I considered the hazard in operation, and it was on that ground that I recommended that as much of the check basin as practicable in connection with its necessity as an equalizing basin be eliminated. The check basin is somewhat saucer-shaped, a good deal longer in the direction of the canals than it is cross-wise of the line of the canal; and it is the portion that is, you might say, in the center of this depression that is below the grade of the canal, and covered somewhere in the neighborhood of twenty acres, I believe, that never did drain out.

Well, if the periods of the running of the water were far enough a part so that this depression that was below the grade of the
54 canal should dry up between the runs of water, there would be perhaps twenty or twenty-five acre feet of water required to fill this up again before the water would run on down the canal, there being some water left in there after every run. And if the period was long enough before other water was run in, of course that was an absolute loss; there was so much loss every time the canal system was shut down and operation resumed again. There was no unsual loss of water this last year. There were such losses in 1912. I don't know whether at any other time than that or not. The basin is covered with a deposit of soil from two feet up to eight or ten feet in thickness, at any rate. I don't know—we haven't dug holes enough in there to tell just exactly the thickness all over the basin, but it varies from two feet to at least eight or ten. Under the soil there is a hard pan, what is commonly known as a hard pan formation in most places where it has been opened or disclosed in any way. And then below this, so far as is known, there is a lava formation. The soil rests upon a hard pan formation, and this on a lava formation, lava rock. It is true particularly in the northeast part that under a thin layer of comparatively impervious soil lies a formation that is gradually becoming softened so that it gives away, allowing the soil to settle and consequently it and the water to escape through the fissures in the underlying lava.

55 The means adopted to improve this check basin was the construction of an embankment to the west of the center line of the basin, the basin lying very generally in a north and south direction, that is, the long direction of it. And we proceeded to eliminate as much of the check basin as possible by the construction of a bank through the check basin, the location of which would not necessitate any of the—the removal of any of the soil from the bottom of the check basin, as it would be after the improvement. I don't know whether I am clear on that or not. The construction of one single embankment would leave a considerable acreage in the northwest part of the basin still subject to ordinary seepage and evaporation, although it was not a treacherous part of the basin,

never had developed any crevises there. And it was also recommended that an additional bank be built through the lower part of the check basin so as to cut off this northwest area, so that the lower half of the check basin would all be done away with except a canal about fifty feet in width, this canal being all built in embankment, no excavation being done.

We don't expect to put in the second embankment this year on account of the time. If we had time to do it we would.

I estimate the cost of the improvement, the total of the one bank, based upon the cost of the work that has already been done, the estimate for the purpose of maintenance assessment for this year,
56 the total cost of the bank, the one bank being completed, as $27,000.00. That, however, we can materially reduce the cost of that by letting a contract, I am aware of that now, so that the cost of that one bank will not be as much as that. The other bank would cost about $9,000.00 at the same expense, that is, the same expense per yard, the same proportionate expense.

There will be about 2,200 feet of the check basin at the time it is full of water. The water surface will be from 250 to 300 feet wide, the width of the water surface, depending upon the height at which the water is being run, that being the maximum, 250 to 300 feet. And then the width below that would be about 85 feet, 80 feet, 82 feet, to within about—oh, perhaps six or eight hundred feet from the present end of the check basin, when it would widen out again to three or four hundred feet; I can't say exactly as to that, but then something,—that is as near as I can tell you without the maps, and I haven't them here.

Well, there never has been any trouble to the west side of the location of the bank, so far as I know. There has been trouble on the east side, and there has been a little right at the upper end of the check basin on the east side, but very little compared with what is at the lower end of the check basin,—just small holes developed which were fixed without any particular trouble, and never gave any more trouble so far as I know. The soil has every indication
57 of being better on the west side than on the east side. I am basing my statement very largely on the fact that there has not been any trouble there. We havent' done any sinking in the soil to amount to anything, so that I couldn't give you the depth of the soil from the standpoint of having actually measured it, because we have let it alone just as much as we can, don't do any excavating at all on the west side of the embankment.

We do not propose to dig any test pits to ascertain the condition of the soil and the formation there. Test pits have been dug at some time previous, which I have never made any examination on, but which I have seen a report of, in the west part of the check basin or along the outside of the check basin to the west. I couldn't say just where they are, but they disclosed rock at a depth of five or six feet, or somewhere about that, so that a canal five or six feet deep, that is, cut with a depth of five or six feet around the west part of the check basin would go into rock work.

It would be advantageous to build another dike on the west side if the embankment that we are building at the present time were to be left as the only construction through there it should be raised higher than we are raising it to protect against wind action, due to the wind blowing across the wide part of the reservoir, creating waves that would tend to tear the bank down. If the additional em-
58 bankment is built, then the height to which we are building it is sufficient. I would consider it desirable to build this other bank. The greatest heighth the bank will be above the ground will be a little over 11 feet. About one-third of the east bank is now completed. The embankment does not follow the exact flow line of the canal and part of it is built on ground somewhat below the grade line of the canal. If the check basin was used with enough water to irrigate the whole tract, the bank in its present condition would be submerged. We can run some water and have run some. We got the earth to build the present dike from the portion of the check basin that is to be eliminated. It is on the east side of the embankment, and would be about 150 feet wide, and I should judge for a distance of about 3,000 feet. We were down to a boulder formation in one or two places, but not to any solid lava rock anywhere. We propose to get the remainder of the dirt from the abandoned area of the check-basin. The cost of another embankment to the west would be $9,000.00. That is the only one that I would consider necessary to prevent the wave action. That is the only place that the check basin would still be wide enough to create any very extensive wave action.

It would not be advisable from an operating standpoint to confine the water to a closer area than from 250 to 350 feet wide. There has got to be about as much of a basin left as that for what
59 is ordinarily termed an equalizing basin, or something to take care of the discharge from the tunnels. It is impossible to operate closely from a reservoir under such pressure as we have there and regulate the amount of water we turn out directly from the gates from the reservoir. It has to be turned out into this what we might term an auxiliary reservoir, and from that, having some little leeway from that.

I tried to explain why it is necessary to have a check basin. You can't measure the water close enough under the gates under that pressure. If you discharge it right into the canal it would overflow the banks and you wouldn't get the desired amount. It would be either above or below—too great a variation.

There has been $7,000.00 in cash expended so far on this work and $2,000.00 worth of maintenance warrants to be applied on the 1919 maintenance charges. The $7,000.00 came out of the item in the 1918 estimate filed with the Land Board for general maintenance work. This work in 1918 was done in September, October, November and December by the Salmon River Canal Company. It was done by day labor. There was an attempt made to get help from the farmers, but they were busy with their fall work, that is, none of them responded, that is, scarcely at all. We hired the teams

wherever we could. The matter of doing this work was
60 taken up with the farmers' organization, the Settlers' Association, by furnishing them a copy of the plans and a copy of my report to Mr. Hall, that is, furnished it to the President of the Association, Mr. Carter, and told him exactly what we calculated to do and how we calculated to handle it, and then I had printed several hundred notices that I posted on various parts of the tract, just wherever the ordinary sale bills were in the habit of being nailed up, I nailed these up, advertising for help, for men and teams, giving the wages that I expected to pay, and the gist of the advertisement was that we were going to work on the check basin a mile and a half from the dam, and wanted men and teams, and gave the wages, and also stated that the work for single handed labor, including the drivers, would be paid for in cash, and the amounts due for the hiring of teams would be paid for with maintenance certificates to be applied on 1919 maintenance.

These notices were over the name of the Salmon River Canal Company signed by me as superintendent. The part of the bank we worked on is about 3,800 feet long. As we go higher it will be longer, the whole bank by the time it is completed will be, I think, 4,800 feet long. The bank will only be 11 feet high a short distance. It varies from that to nothing. The wind action can be protected against by the rip-rapping. It would be serious if you were just going to build an earth bank and go away and leave. We have let a contract with the Morrison-Knud-
61 son Construction Company for the completion of this bank. I let it as superintendent of the Canal Company. They are to start work not later than the 31st of March. They have hauled hay and grain on to the work already and are getting their outfit on the job. The contract price was 45 cents a yard. We haven't determined the yardage exactly but it is in the neighborhood of 38,000 yards, which will make the cost of that one bank about $24,000, including what we spent last fall. I should have said $22,000, $13,500 will be about the amount paid Morrison-Knudson as near as we can tell until we have absolutely cross-sectioned the work. We propose to pay that out of maintenance charges which have been levied.

I have compared the efficiency of the system in the way of water deliveries as compared with the efficiency of other irrigation systems similarly situated and it compares very favorably. The transmission losses are in the neighborhood of thirty per cent, very rarely in excess of that, that is, for the system as a whole, which is to be considered very good for a system of that size, the distance that the water is transported. I couldn't consider the *the* work that has been done on the check basin justifiable simple as a commission proposition as to the amount of water saved. There will doubtless be a little water saved. The losses were so reasonable as compared with other systems that there couldn't have been any ex-
62 cessive losses during the years I have gone into the records. I couldn't see any indication of losses that would justify the

construction merely from the standpoint of the water being saved that was saved year by year or would be saved. As to 1912 I only know that when these holes broke out there was such a loss that they couldn't put water, or enough of the water as was desired into the canal known as the "A" canal. That is just as I have heard it. The hole or holes that developed were cut off from the basin by a bank and no such holes developed in later years. I have examined the plans under which the system was constructed and which were approved by the State Board and the State Engineer for the system. These plans do not call for a canal such as we are now building or for any canal through the check basin. The check basin is just a natural depression. The only construction in connection with it is for the discharge from the canals into it and the outlet canal out of it. It was adapted to use as a regulating basin and served that purpose but it was originally larger than needed for that purpose. I have never gone below the lava rock to see what there is underneath. We have uncovered the hard pan in some of the excavations in a place or two, but we haven't developed any holes at all in the work so far. The transportation system in the whole distribution system from the measuring station, which is between the two tunnels, to the
63 farmers' headgates the loss varies for the different years from twenty-seven to thirty per cent. That includes the check basin. In my report to the President of the Canal Company I referred to the changes that might be made. The canal might be built either through the basin or around the basin. If the canal was built at an ordinary canal width through the entire length of the basin it would not operate satisfactorily as an equalizing basin. I didn't recommend the construction of a canal through the basin. I said that a canal might be built through it which would require about 100,000 cubic yards of material, estimated at that time at twenty cents per yard, but I didn't recommend it. I recommended a compromise between the two. I estimated the whole thing would cost about twelve or thirteen thousand, estimating that the dirt could be moved for twenty cents a yard. The work is costing very nearly three times as much as I estimated it would cost before we started the work at all. We have the assurance to the extent of $2,000 deposit of Liberty Bonds that it will be done for the price of $13,500, and the ability of the contractors to perform the work, and that is all the money they will get for it. This firm of Morrison and Knudson are experienced contractors. I have known Mr. Morrison for fifteen years and Mr. Knudson for four or five years.

In answer to questions by the Court the witness testified as follows: Basins of this kind are considered standard or very
64 advantageous in connection with any irrigation system. The Murtaugh lake on the South Side Twin Falls project is a very large example of this same kind. It was left there very largely for the closer regulation and the quicker regulation of the water down below on the tract. It covers twelve hundred acres I believe,—I guess eight hundred is right, or several hundred acres though.

The matter of economy entered into it very largely, but it was considered as an advantage to the operation of the system. That element entered into it There is none on the Oakley project. That is a reservoir project and there is no opportunity, no chance for anything of the kind there. I don't mean to say they couldn't get along without it, but it is very desirable to have. I venture to say that we can regulate the water, the operation of the Salmon tract can be carried on more closely to the amount of water desired than it can on the Oakley tract, just for that one reason. The Oakley project would be better if it had something of that kind. The water has to be measured some place, and measured—the line of communication, or the distance from the reservoir gates to the operating gates, is something over two miles on the Salmon tract, and it couldn't be made any less than that, due to the topographical conditions, and couldn't be otherwise, and the water would either have to be measured so far as the practical operation is concerned, either by computing the flow through the reservoir
65 gates, which of course have a very small opening when operated under a high pressure, when the reservoir is full, or it would have to be measured at the cut where we do measure it at the present time, and that would have to be the point of measurement to determine whether the amount was in the canal that was required for the orders for that day, the farmers' demands, so as to meet the demands of the farmers, or there would have to be a method of communication which would be dependable from the gauges below the headgates of the "A" canal and the main canal, which are two miles away, and the line of communication couldn't be depended upon absolutely, and the time taken for the water to travel there would be long enough so that the operation, the determination of the amount of water actually in the canal, where they are being changed every day,—we don't run the same amount of water every day,—where these amounts are being changed every day it couldn't be regulated to as fine a point from the reservoir as it can from the gates down at the canals, and operated where the man at the gates has full control of the operation, and the gauges are just within a very few feet of where he is operating the gates, instead of two miles from where the man would be operating the gates, if we tried to do it the other way, without the check basin. If the man operating the gates two miles below closed them down that would raise the level of the water in the check basin under present conditions unless the man at
66–79 the reservoir shuts his gates. There is practically no fall through the check basin and the outlet canal, there is a little, something like sixteenths, but the flow of the headgates at these canals is about six-tenths of a foot lower than the discharge end of the second tunnel, two miles way. No it isn't two miles away, it is a mile and a quarter. I have computed the area the surface of the water would be in the so-called check basin after the two embankments were constructed, and it is all on maps where it shows up very plainly, but I can't tell exactly what it is at the

present time. It is something less than fifteen acres, total water surface. I didn't bring any of that here, I didn't have any idea it was going to be called for.

* * * * * * *

80 F. A. WILKIE produced as a witness on behalf of plaintiffs
81 being first duly sworn, testified as follows on direct and cross-examination: My residence is Boise, Idaho. Occupation, Civil Engineer. I have been engaged in the practice of engineering about fifteen years. I am not a graduate of an accredited school of engineering. I have lately occupied the position of State Engineer of the State of Idaho. I have examined the irrigation project known as the Salmon River project and what is termed the check basin, and also the plans and specifications with reference to the construction of the Salmon project on the north and east corners of the check basin there were some large holes where the water had cut through the soil on top of the underlying lava rock. On the theory of the original design of the system I think the check basin was considered necessary in operating the system and some of the other designs or some of the other conditions in connection with it would seem to require it. The check basin is a natural depression in the ground, extending about 5,200 feet northward from the mouth of the tunnel, tunnel No. 2, and afforded an opportunity for conveying water that distance without any construction work, and was made use of evidently by the designers of the system at that time for that purpose, and the canal constructed out of it from the north end through a rock cut. It seems—I would thing the design
82 was at that time to make it serve two purposes, *to serve two purposes*, to check the velocity of the water out of the tunnel, and to form a kind of an equalizer for the heading of the two canals, where it forked about 3,400 feet further north from the north end of the basin. Looking at it from the point of standard construction at the time it was built, Mr. Wilkie, would you say that the check basin was necessary as an equalizer in the operation of that system?

Mr. Haga: Objected to as irrelevant and immaterial as to what the witness may consider necessary. The plans and specifications approved at the time would be the only controlling feature with reference to that. Engineers might agree or disagree on that. If it was built according to the plans and specifications approved at the time, I think that would be conclusive.

The Court: I think I shall let it go in, although I have great difficulty in seeing its materiality. But in order that the record may be complete it may go in under the objection. You may answer the question, Mr. Wilkie.

The witness continued as follows: I think as a matter of actual necessity to the system, that it was not necessary, but other features of the construction in connection with it were designed and based upon that use of the check basin, so that, taking it altogether as

the system is constructed now, there would have had to have been some other changes to have taken the place of the check basin had it not been used. I think that the system, viewing it as
83 we see it now, I am of the opinion that the system would have been better had the check basin not been used, if the other features had been designed accordingly. The check basin, the theory of the check basin was that it would gather up a volume of water, that is one theory of it at least, reduce the velocity from the tunnel, without constructing any other device to do it, and the water in it could be raised sufficient to make a head to take the water out through the rock cut and into the main canal and the "A" lateral. Now, the heading of the "A" lateral and the main canal, which are a little over—nearly two miles from the tunnel, are only six-tenths of a foot lower than the mouth of the tunnel, so there isn't proper grade during that length for an open canal, and the check basin is used to create a head to force the water through the rock cut and into those canals in lieu of the fall between the mouth of the tunnel and the heading of those canals. I hardly think if they had designed to build the canal from the mouth of tunnel No. 2 to the head of "A" lateral they would have designed it with so little fall. I understand that with the present grade it still has to operate as a check basin. The banks of that canal that they are building now are supposed to be built high enough so that the water can be backed up in the canal enough to create a velocity head for the rock cut and the headings of the ditches, of the "A" lateral.

Well, yes, it probably would have been better in the first
84 place. It would have reduced the hazard. Of course, there is hazard in the canal banks through there, and they occupy a portion of the bottom of the basin, but of course the hazard is eliminated and the seepage is eliminated and the evaporation is eliminated to some extent by the work that they are preparing now. The office of that basin as it is proposed to be improved will be to regulate the water as it passes through the rock cut and is delivered to lateral "A." It will have to be used as a place to accumulate a head to give the velocity through that cut. The cut isn't large enough to draw sufficient water, and there isn't fall enough to draw sufficient water, without a head in the basin to create the velocity. I don't think it would be required as a regulator in order to measure the water as it comes from the tunnels. If the rock cut had not been lowered sufficiently and the "A" lateral and the main canal had been lowered sufficient to give a grade in order to secure velocity the canal construction could have been made through there. I don't know where the established grades are or how much they would have to be lowered. They would take something over a foot.

I have examined the check basin three times. I have been over other parts of the system rather thoroughly as State Engineer and while I was deputy State Engineer. I never made any tests of the losses in the check basin. I have only investigated records and talked with as many people as I could find who had informa-
85 tion on the system. Well, the actual losses that we have been able from the records, that I have been able to examine,

have not shown a very material loss in the basin, although before I ever saw the basin those large holes I referred to had been diked off, a bank had been built around them, and the measurements that have been taken to determine losses in the check basin include in their area also 3,400 feet of the rock cut. The measurements of the water going out of the basin were made 3,400 feet below the basin, so that the losses actually attributable to the basin have not shown up large on the records. The measuring device above the basin was at the head of tunnel No. 2. It is about a quarter of a mile long. The measuring device below the basin was a little ways above the head of the main canal, about three thousand feet below the basin outlet. Between the two measuring devices we have tunnel No. 2, the check basin and about 3,000 feet of rock cut below the basin. The losses in that strip of tunnel, canal and check basin don't seem to be excessive. I know nothing of the gathering of the records. I simply computed the conclusions. The losses don't seem to be very excessive for the number of acres covered by the basin. The losses in the system as a whole did not seem excessive. The records that I got I got from the Company and scraps of data that existed in the State Engineer's office. The bank that was built

86 to cut off the holes that existed in the northeast corner of the basin which had developed in early years on the system was in very good condition about a month ago. I am informed that the dike was built early in 1912. I haven't seen any holes which have developed in the last five or six years that have seemed hazardous. I have heard that some have developed and been repaired, but I have no personal knowledge of that. I didn't find anything serious from my examinations except those that were diked off. From my investigations I concluded that it may not have been entirely necessary to build this bank except as eliminating the element of hazard. I think it is desirable for that in reducing the area of seepage and the liability to break holes through the soil. The soil blanket in the check basin ranges from four to twenty feet thick. It seems to be underlaid with a broken up pile of rock. Such depressions as this check basin have been taken advantage of in the construction of irrigation works to avoid artificial structures. Considering the fact that the water is discharged from the reservoir under great pressure directly into the canal or tunnel, some sort of a device for checking the velocity of the water would have to be provided and it seems to have been the theory of the designers to take advantage of this basin for that purpose. They were also able to maintain the canal below at a higher level than they otherwise

87 could. Such depressions have frequently been taken advantage of by other systems to avoid artificial construction. The witness thereupon identified as plaintiffs' exhibit No. 1 a copy of the report made by him as State Engineer, and Mr. W. G. Swendsen as consulting engineer, and the same was offered in evidence and it was stipulated that the record might show that Mr. Wilkie and Mr. Swendsen had signed the original report. Said report was admitted in evidence without objection and is as follows:

"Office of the State Engineer, Boise, Idaho.

March 4, 1919.

State Board of Land Commissioners,
Capitol Building,
Boise, Idaho.

GENTLEMEN:

Pursuant to your instructions, I, in company with Mr. W. G. Swendsen, left Boise on Monday evening, Feb. 24, 1919, for the purpose of making an examination of what is known as the check basin on the Twin Falls Salmon River Project, arriving at Hollister in the afternoon of the 25th, and going immediately to the dam and outlet works of the system following them from the dam down through the check basin to the head of the A lateral, making a careful examination of the check basin and the conditions of the same, and incidentally visiting two other places on the system at the request of settlers. On the following day we examined the records of water delivery and losses and all maps and data in the office of the company at Hollister and returned to Boise that evening.

We have gone carefully through all the records in the
88 State Engineer's office and all abstracts upon the records of the Land Board, and carefully considered all of the same and the following is herewith presented to you as our report:

General Description.

This basin is a natural depression in the earth's surface, such as are common throughout the lava plains of Idaho, and prior to the construction of the canal leading therefrom the same had no surface outlet. It appears not to have been formed by erosion but is rather the result of a pothole or depression in the underlying lava upon which has been deposited, by wind and erosive action, a layer of rather light lava soil or silt of varying depth.

The basin is surrounded by a rim of outcropping lava ledges and forms what might be a remnant of a small volcano or crater. It is located near the head of the main canal as shown on Exhibit A attached hereto.

Original Plans.

A general plat or plan showing the location of the entire proposed canal system was approved by the State Engineer and the State Board of Land Commissioners, February 13, 1911, and a print copy thereof, showing such approval, was filed in the office of the State Engineer, March 3rd, 1911.

This plat shows the location and general outline of the check basin, the main canal leading thereto and therefrom and discloses the general plan to use the same as a part of the main canal.

Exhibit A attached hereto is a copy of that portion of this general map covering the territory occupied by the check basin and the coun-

try adjacent thereto, upon which is indicated the title of the map and the approvals herein above mentioned. As will be noted, this map is called "General Map and Index to Detail Sheets."

89 These detail sheets are merely maps drawn to a larger scale and show in some detail the location of the contemplated works and structures in addition to certain topographic and other data.

Detail Sheet No. 78 covers the check basin country and while a considerable number of these sheets are on file in the office of the State Engineer, the same bear no stamp of approval and Sheet No. 78 is missing from the State Engineer's files and there is no evidence to show that the same was even filed therein. We obtained a print copy of this map or detail sheet from the company's office on the 26th instant from which it is evident that the plan of development contemplated the use of this basin as a part of the main canal without any improvement or work thereon.

A plat designated as "Table of Elements" was approved by the State Engineer and the State Board of Land Commissioners, February 13, 1911, and filed in the office of the State Engineer, March 3rd, 1911. This table shows the length, dimensions, capacities, etc., of the main canal and laterals and lists the check basin under the heading "Main Canal" and indicates that the same extends from Station 0 to 32, a distance of 3,200 feet, but gives no other data concerning it.

The general map and table of contents herein above referred to are the only approved plans on file in the State Engineer's office, covering this basin.

Inspection of Works—Engineer's Reports.

To insure the construction of the works in accordance with the plans and in conformity with the contract, the State Engineer kept inspectors on the work during its progress.

These inspectors submitted written reports to the State En-
90 gineer from time to time concerning the progress, character and condition of the works, but none of these reports contain any references to the check basin except [illegible] written after the project was virtually completed and the water turned into the main canal. This, however, is not strange since the plans contemplated the use of this basin in its natural state and thus no work was performed thereon.

The following are quotations from various Engineers' reports on file in the office of the State Engineer concerning the check basin:

"* * * Work on the canals has stopped, leaving the system as a whole more than 99 per cent finished. * * *"

C. A. File 370.016: By R. S. Cookingham, C. A. Inspector. December 31, 1910.

"* * * We are not yet able to determine the factor of loss in the equalizing basin between the lower end of tunnel No. 2 and the headgate of the main canal and canal A. * * *"

C. A. File 370,029: By R. S. Cookingham, C. A. Inspector. June 14, 1911.

"* * * I notice in connection with the check basin that there are indications of crevises under the earth layer which showed action similar to that on the bottom of the Jerome reservoir last fall. This would indicate that there was a possibility of some loss during the time that the water stands in the basin. * * *"

C. A. File 370,041: By C. C. Carhart, C. A. Inspector. April 11, 1912.

"* * * The basin just below tunnel No. 2, has in the past developed some very serious leaks, but in my opinion, before the project is turned over to the settlers, these leaks will be stopped. * * *"

C. A File A. .026: By A. E. Robinson, State Engineer. February 27, 1913.

91 "* * * Leaving aside the question of water supply, the Salmon River works are such that the designing engineers can well be proud of and no fault can be found with the project from the standpoint of construction. * * *"

C. A. File 370.23: By A. E. Robinson, State Engineer. October 7, 1911.

"* * * Mr. Hyde in discussing the condition of the system with representative settlers found that there did not appear to be much contention as to the completion of the system, except with reference to the question of the losses occurring in what is known as the check basin between Station 0 and Station 50. * * * Obviously it is as much to the interest of the company to reduce losses to a minimum as to the settlers and Mr. A. J. Wiley, consulting engineer, has within the past few days advised the company to build a two bank canal from the end of the tunnel at Station 0 to connect with the thorough cut which begins at Station 32 and extends to Station 66. This canal to be located upon the west side of the check basin with its bottom in a cut of ½ foot, depth of water to be 8½ feet, bottom width of canal to be 32 feet, banks to have top width of 8 feet, and 2 feet free board, inside slopes 2 to 1, outside slopes 1½ to 1, capacity to be 1,000 sec. ft. Mr. Wiley estimated that this canal which would do away with the losses in the check basin could be constructed for about $11,000.00. * * *"

C. A. File 370.41: By Hoyde, C. A. *Engining* State Engineer. December 30th, 1914.

"* * * Did not examine the check basin or the open cut from the check basin to the beginning of "A" lateral but it is contemplated by the company to lower and widen the rock cut from the check basin to the beginning of A lateral for the purpose of
92 lowering the water in the check basin. There is a break in the bottom of the check basin which is surounded by a dirt

mistake was called to its attention by a petition for a rehearing accompanied by a transcript embodying the omitted pleading, that it should grant a rehearing before recalling its first decision and deciding the appeal on the merits, the term not having elapsed and a full hearing having been had at the beginning. P. 89.

2. The laws of Idaho concerning irrigation projects under the Act of Congress known as the Carey Act (c. 301, § 4, 28 Stat. 422,) provide that assessments for maintenance and operation, where the operating company has not come under the control of the settlers, shall receive the approval of the State Land Board before payment is exacted from the settlers, making it a condition to such approval that the Board be satisfied that the proposed expenditures for which the assessment is made are necessary for the maintenance and operation of the irrigation works and are proper charges against the settlers. *Held*, that an act of the Board, purporting to approve an assessment tentatively as for maintenance, leaving for future determination the question whether the work in view was indeed for maintenance, or construction work for which settlers could not be assessed, and providing that, in the latter event, the Board would require that amounts collected be credited on settlers' contracts for water rights or be repaid them in cash by the company—was in effect no approval, and that settlers were entitled to repayments of amounts collected under it by the company. P. 90.
3. As the Idaho law does not vest the State Land Board with power to adjudicate rights to repayment of moneys thus wrongfully collected, their adjudication in the courts is not an encroachment on the province of the Board. P. 92.
4. Concurrent findings of two lower courts that work for which an irrigation assessment was made was construction work and not for maintenance, *held* sustained by sufficient evidence. *Id.*

272 Fed. 356, affirmed.

APPEAL from a decree of the Circuit Court of Appeals affirming a decree of the District Court requiring the appellant company above named to repay to settlers on an irrigation project moneys collected from them by assessments to defray the cost of certain work thereon.

Mr. Oliver O. Haga, with whom *Mr. McKeen F. Morrow* and *Mr. J. L. Eberle* were on the briefs, for appellants.

Mr. James R. Bothwell for appellees.

MR. JUSTICE VAN DEVANTER delivered the opinion of the Court.

This appeal presents a controversy over an assessment for operation and maintenance of the Salmon River irrigation project in the State of Idaho.

In 1914 eight settlers under the project, for themselves and all others similarly situated, brought a suit in equity in the United States District Court to obtain a comprehensive adjudication of various disputes which had arisen respecting the relative rights and obligations of the parties interested in the project,—the court's jurisdiction being invoked because of the involution of the construction and application of the Carey Act, c. 301, § 4, 28 Stat. 422, and its amendments. The principal defendant was the company which had contracted with the State to construct the irrigation works and to sell necessary water rights to settlers; and another was the company which was to operate and maintain the works when completed, but which was as yet under the control of the construction company. The early proceedings in the suit are reported in 225 Fed. 584, and 242 Fed. 177.

In 1919, while that suit was still pending, the two companies—one still under the control of the other—made and sought to collect from the settlers an assessment of fifty cents per acre to defray the cost of work about to be done on a section of the irrigation works called the check basin. The assessment was made as part of an annual maintenance charge which the settlers were to bear; but they refused to pay because they regarded the work as construction work the cost of which was to be borne by the construction company. The companies threatened to shut off the water if payment was not made; and one of the plaintiffs in the equity suit, for himself and all other settlers, brought an action in a court of the State

to have the assessment annulled and to enforce delivery of the water.

During a subsequent hearing in the equity suit the defendants therein, who were also defendants in the action brought in the state court, presented to the District Court a petition setting forth the institution of that action, alleging there was such relation between the two proceedings that their prosecution in distinct tribunals would embarrass the parties and lead to possible conflicts of authority, and praying for an injunction against the prosecution of the proceeding in the state court. An informal but extended discussion followed, in which counsel on both sides recognized the propriety of drawing the whole matter into the District Court. Counsel for the plaintiffs took the position that, if the injunction was granted, there should be some provision assuring prompt repayment to the settlers if the assessment was collected and their objection to it afterwards was sustained by the court. Counsel for the defendants assented to this and indicated that the defendants or some of them stood ready to give a bond of that character. Accordingly the court, with full acquiescence of the parties, entered an interlocutory order (a) enjoining the prosecution of the action in the state court, (b) requiring the construction company within a limited time to execute a bond to repay within thirty days all moneys collected on the assessment if the court determined it was a construction charge to be borne by that company rather than a maintenance charge to be collected from the settlers, and, (c) enjoining the collection of the assessment if the bond so required was not given. The bond was given and the settlers paid the assessment. Subsequently, after a due hearing, the court rendered a decree determining that the work was construction work the cost of which was to be borne by the construction company, and requiring that company to repay to the settlers within thirty days the amounts collected from them.

The defendants appealed to the Circuit Court of Appeals, which at first reversed the decree, but later in the same term, on finding that it had proceeded on a mistaken understanding of the circumstances in which the District Court came to adjudicate the controversy, changed the reversal into a decree of affirmance. 272 Fed. 356. The appeal to this court is from that decree.

1. The defendants complain that the Circuit Court of Appeals in changing its decision acted on an application for rehearing and evidence submitted therewith without granting a rehearing.

It is true that the change in decision was prompted by an application for rehearing, but not that any evidence was submitted with the application. What the defendants refer to as evidence was not such, but was a supplemental transcript containing their petition for an injunction against the prosecution in the state court of the action relating to the assessment. The petition had not been included in the original transcript sent to the Circuit Court of Appeals; and that court, finding no pleading relating to the controversy over the assessment, held that the District Court had no occasion to adjudicate the controversy, and accordingly reversed its decree. When that decision was announced the plaintiffs obtained the supplemental transcript and, under a prior stipulation permitting omissions in the record to be supplied, filed it in the Circuit Court of Appeals with an application for rehearing. The court then recalled its first decision and substituted another dealing with the merits of the controversy and affirming the decree. The second decision was given at the same term as the first, and therefore while the matter was still within the court's control. An examination of the two transcripts shows that the supplemental one served only to bring sharply to the court's attention what already appeared in the original—that the controversy was laid before the District Court in circum-

stances which made it admissible and appropriate for the court to proceed to its adjudication. Among other things, the original transcript set forth at length the discussion had when the defendants presented the petition for an injunction, and also contained the interlocutory order made at the time and the bond given under that order. The discussion, as set forth, disclosed the substance and purpose of the petition, the nature of the controversy over the assessment and a tacit consent of the parties that the matter be dealt with on the lines followed in the interlocutory order and bond. The ultimate decree recited that it was rendered after a hearing had under the order and bond. In short, the original transcript showed such a submission of the controversy that the absence from the record of the petition for an injunction was not material.

In our opinion it was quite admissible in the circumstances for the Circuit Court of Appeals to change its first decision and correct the mistake therein by disposing of the merits without granting a rehearing. The parties had been fully heard in the beginning.

2. The defendants further complain that in adjudging that the moneys collected on the assessment should be repaid to the settlers the court failed to give proper effect to what the State Land Board had done in the matter and encroached on the board's province.

By the laws of the State the board is invested with authority to supervise the fulfilment of contracts for the construction of irrigation works under the Carey Act and to accept the work when completed. But there was no acceptance in this instance. One of the state laws, c. 14, Sess. Laws 1917, requires that assessments for the operation and maintenance of such works, where the operating company has not come under the control of the settlers, which was the case here, shall be submitted to and receive the approval of the board before payment is exacted. This assessment was submitted to the board, and the

settlers objected that it was not for operation or maintenance but for construction. A hearing resulted in the adoption by the board of a resolution declaring that it was not then prepared to pass definitely on the matter and would secure further data during the approaching irrigation season on which to rest a definite conclusion, but that it would temporarily approve the assessment as one for maintenance in order that the money might be collected and the work proceed, and if it ultimately concluded that the work was construction work it would require the amounts collected to be applied as credits on the settlers' contracts for water rights or to be repaid in cash. This was not satisfactory to the settlers, so the matter was taken into court as before shown.

It is not necessary to consider what effect should be given to an unqualified approval by the board, for there was none here. In effect what the board did was to say: "We cannot determine from the data before us whether the work, to pay for which the assessment is made, is construction work which the construction company is bound to do, or is maintenance the cost of which is to be collected from the settlers, so we reserve that question for future investigation and determination; but to tide the matter over we now give the assessment a merely tentative approval, and if we ultimately determine that the work is construction work we shall see that the settlers receive credit on their water-right contracts for the amounts collected or that they are repaid." The state law makes it a condition to giving an approval that the board be "satisfied" that the proposed expenditures "are necessary for the operation and maintenance" of the irrigation works and "are proper charges against" the settlers. This prerequisite was plainly wanting, as is affirmatively shown by the board's resolution, and therefore the tentative approval, only formally given, was in contravention of the statute and of no effect. The law also makes the board's approval a condition to the right to collect an assessment;

and of course where the board does not approve it can give no authority to collect. As the collection was made without the prescribed approval, and therefore without right, the settlers were entitled to repayment. The state law does not purport, nor has it been construed, to vest the board with power to adjudicate rights to repayment of moneys thus wrongfully collected; so their adjudication in the courts is not an encroachment on the province of the board.

3. It is also complained that the findings of fact on which the decree rests are not in accord with the evidence. Of this it suffices to say that the courts below concurred in the findings and we think there was sufficient evidence to sustain them.

Decree affirmed.

TWIN FALLS SALMON RIVER LAND & WATER COMPANY ET AL. *v.* CALDWELL ET AL.

APPEAL FROM THE CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

No. 8. Argued March 3, 1924.—Decided October 27, 1924.

1. Where the existence and merits of a controversy brought into an equity cause by a supplementary petition and decided by the District Court were adequately revealed by the record taken to the Circuit Court of Appeals, though the supplementary petition itself was omitted, but the court, misled by this omission, reversed the decree upon the ground that the matter, for lack of a pleading, was not before the District Court, it was not necessary, when the

dyke which the company is going to raise and widen. * * * It is also claimed that the losses in the check basin were excessive. According to measurements made by A. J. Wiley (See Footnote) and Don Bark the losses are approximately 1 Sec. ft. in 24 hours per square foot of area covered. Although this is not an excessive loss the operating company contemplates building a canal along the west side of the check basin in order to save the greater part of this loss and to eliminate the danger of breaks which occur in this basin. * * *"

C. A. File 370.41: By Hoyde, C. A. Engineer. December 30, 1914.

"* * * The check basin is a natural depression or a lake bed, which, when filled with water, covers approximately 70 acres of land. Originally the area was greater, but, owing to the developing of cave-ins and the apparent dropping out of the bottom of the basin, in different places, the company has been forced to build dykes on the east side of the basin. During my investigation of this basin, in April, 1915, after a domestic run of water had been made, I found one hole, concave in appearance, with an opening in the center of 1½ feet in diameter, with no bottom in sight. As this concavity — quite an area, and with wate*d* standing from three to six feet deep in the basin during a run, a considerable loss of water must be experienced, for undoubtedly this hole extended indefinitely between a fissure in the lava bed, underlying the basin. The following is from 'Duty of Water Investigations' by Don Bark—'This 93 check basin is simply an enlargement of the canal or a pothole which is used as a part of the canal section to eliminate the necessity of constructing a canal around it. The soil in the bottom of the basin is a clay loam varying in depth from one to two feet, underlaid by lava rock. The measurements clearly indicate that it would be wise to construct a canal around this depression. * * *"

C. A. File 370.32: By S. T. Baer. June 15, 1915.

"* * * The second exception covers what is known as the 'check basin' its location being approximately 1½ miles north of the dam. The water released from the dam is conveyed by open channels and tunnels to this natural basin, having approximately a water area of seventy acres and a depth of 4 to 6 feet during the irrigation season. At the south end of this basin artificial channels again convey the water to lands to be irrigated. The basin between the inlet and outlet has a length of 3,200 ft. Since the works have been used as a conveyance of water, this basin has developed numerous pipes or cylindrical shaped holes in its bottom within the limits of its water area. These vary in diameter from several inches to several feet. The soil forming the bottom of the basin, as observed in a couple of these holes, is 15 to 20 ft. thick over a lava formation.

These pipes or holes develop serious losses; losses sufficient to in-

NOTE.—This undoubtedly means cubic foot instead of second foot.

fluence the elimination of considerable acreage from the irrigable area of the project. It would be greatly to the interest of all concerned to remove this feature by the construction of a canal between the inlet and outlet and to one side of the basin. However, the general plans and table of canal elements on file in this office, including the basin, bears a former Land Board and State Engi-
94 neer's approval. It appears to me to be necessary to have the meaning of such approval interpreted as to its finality. * * *"

C. A. File 370.46: By J. H. Smith, State Engineer. January 16, 1916.

Desirability of the Improvement.

After having carefully examined the basin on the ground and considered all of the available data concerning its condition, the loss of water therein, etc., we are convinced that it should be improved if not entirely eliminated by new construction.

There seems, however, no data upon which to predicate a definite or positive computation of actual losses in the basin itself.

We obtained the following records of flow from the Salmon River Canal Company's records which show the annual losses between the upper portal of Tunnel No. 2 and the lower end of the rock cut below the basin.

Year.	No. days in service.	Total at head of tunnel No. 2, acre feet.	Total at lower end of rock cut, acre feet.	Total loss, acre feet.
1916	65	78,489	74,554	3,935
1917	115	138,962	128,879	10,083
1918	59	78,077	74,776	3,301
Totals	239	.....	.....	17,319

Average loss per year..... 5,773 acre ft.
Average loss per day..... 72.04 acre ft.

We find the following in a report by Don H. Bark, Engineer for the U. S. Department of Agriculture, published in a bulletin entitled "Duty of Water Investigations" on page 145, with explanatory note on page 141 concerning losses in this section.

Date.	Discharge upper portal tun. No. 2.	Discharge lower end rock cut.	Loss.
June 14, 1912.....	343.8 sec. ft.	309.6 sec. ft.	34.3 sec. ft.
July 9, 1913.....	476.0 sec. ft.	447.8 sec. ft.	28.2 sec. ft.

From these two measurements we obtain an average loss
95 of 31.2 cu. ft. per second which is equivalent to 62.4 acre feet per day.

Since the company records cover the greater period of time and thus undoubtedly represent more nearly the actual operating con-

ditions, we are inclined to accept 72 acre feet as the actual daily loss in this section.

It should be remembered, however, that the section in which the foregoing loss occurs includes not only the check basin but a rock cut some 3,400 feet long immediately below the basin and wherein we are inclined to believe some considerable loss occurs. This loss can only be segregated between basin and cut by conducting a new set of actual measurements at the inlet and outlet to the basin.

Physical conditions make it almost impossible to make measurements at these last mentioned points and of course such measurements as may be made would have to be conducted when the water is in the canal and to be reliable should continue over the entire irrigation season.

We doubt if the present contemplated improvement will result in saving more than one-third of the loss hereinbefore stated or an amount equal to 24 acre feet a day.

Assuming that the system will be in operation 80 days (the average of the three years hereinbefore referred to), and that 24 acre feet a day will be saved, we have a total of 1,920 acre feet a year at a cost of $36,800.00, which amounts to $19.16 an acre foot. On the basis of three acre feet main canal duty the cost per acre would be $57.48.

We examined three large holes in the bed of the basin and near the northeast side thereof, which were reported to have broken through in 1912. It was found absolutely necessary to eliminate the territory in this vicinity from the basin and this was accomplished by constructing a dyke or embankment around the same. This dyke is still in place and is in fairly good condition.

96 In the operation of this system it has been the custom of the operating company to make delivery of water periodically and thus the main canal and check basin have been dry during certain periods each season. This method of delivery is possible because of the excess capacity of the canal system, and results in some saving of water by reducing seepage and evaporation and aids, in some respects, the farmers in the irrigation of their lands, in addition to affording an unusual opportunity to make repairs to the system. It has been the custom to go over the check basin each time the water is off, carefully examine its bed and fill any holes found. We are advised that in recent years no large holes have been found, although a considerable number of small ones have been filled. Naturally this process of operation should result in a gradual improvement in the basin and thus a reduction of losses.

There is always a chance, however, that large holes such as have heretofore been referred to, may develop, necessitating a shut-down at some critical period and thus causing possible damage to crops under the system.

Because of this hazard, we are inclined to urgently recommend the completion of the work already started.

Physical conditions, however, will not permit of a complete elimination of this hazard since the new canal must occupy a part of

the basin where new holes may develop and the canal banks themselves, especially while new, are the source of some danger.

The east bank should be completed before the coming irrigation season, otherwise that portion already constructed will be liable to great damage if not complete destruction, by wave action. The earth used in this embankment was secured from a borrow pit adjacent to the bank and located inside of the check basin. The removal of this earth increases the chance of the development
97 of serious losses if that portion of the basin is not eliminated.

Proposed Works.

While no plans or specifications for the proposed embankment or ditch through the check basin have been filed for the consideration of the State Engineer, during this examination we have gained a general idea of the proposed scheme.

Briefly stated, it contemplates the construction of a ditch through the basin, the upper half of which traverses the west side thereof and has but one bank, the lower half to have a bank on either side.

It is proposed to construct one bank only during this season, and this work has already been partly performed. This construction, according to the Salmon River Canal Company's records, involves the following:

East bank.....	38,000 cu. yds. earth	Actual cost,	$9,000.00
Now in place.....	13,000 cu. yds. earth	Est. cost,	18,000.00
Balance to complete..	25,000 cu. yds. earth	Est. at 70c.	9,800.00
West bank.....	14,000		
			$36,800.00

Of this sum $9,000.00 has already been spent, $7,000.00 being paid out from the 1918 maintenance fund and $2,000.00 paid with warrants now outstanding.

Seventy cents per yard seems rather excessive for earthen embankment work, but the material is wet and sticky and not easily handled and since this estimate is based on the actual cost of the work already performed, we are inclined to accept the figure as fair.

We suggest that before further work is performed on this job, detail plans and specifications showing the dimensions, grades, capacity, etc., be filed in the office of the State Engineer for his consideration and approval.

Efficiency of System.

We obtained the following data from the records of the
98 Salmon River Canal Company from which we have computed the efficiency of the system as a whole.

Year.	Total quantity measured at head of main canal, acre feet.	Total quantity delivered to farm lateral headgates in acre feet.	Loss in acre feet.	System efficiency, per cent.
1913	77,341	50,175	27,166	67 %
1914	108,571	73,933	34,638	72.7%
1915	41,657	27,080	14,577	72.6%
1916	83,900	57,232	26,668	73.0%
1917	140,634	97,953	42,681	71.0%
1918	82,394	54,517	27,832	70.0%
Average efficiency for 6 years				71.05%

The above date is predicated on daily records of flow at the head of the Main Canal and also the weir measurements at the head of the various farm laterals.

Summary.

From the foregoing it is evident that:

1st. The use of the check basin was a part of the original project plan as approved by the State Board of Land Commissioners and the State Engineer.

2nd. The construction was completed substantially as provided in the aforesaid plans.

3rd. These plans have never been officially amended with respect to the check basin.

4th. No objection was raised, during the progress of the work, by the inspectors *of* other state officials or the settlers to the use of the check basin as a part of the main canal.

5th. After the system was put into operation serious leakage developed in the check basin and the operating company have spent considerable money each year since in improving the same.

6th. That in order to reduce the hazard incident to the use of this basin the same should be eliminated so far as practicable by new construction.

7th. Mr. Smith, former State Engineer, in his report of
99 January 19, 1916, wherein he recommended the acceptance of the works as completed made the following reference to the check basin: "With the following exceptions I consider the construction work of the project complete: * * * The second exception covers what is known as the check basin * * * since the works have been used as a conveyance of water, this basin has developed numerous pipes or cylindrical shaped holes in its bottom within the limits of the water area. * * *

"These pipes or holes develop serious losses; losses sufficient to influence the elimination of considerable acreage from the irrigable area of the project. It would be greatly to the interest of all concerned to remove this feature by the construction of a canal between the inlet and outlet and to one side of the basin. However, the general plans and table of canal elements on file in this office, including the basin, bears a former Land Board and State Engineer's approval. It appears to me to be necessary to have the meaning of such approval interpreted as to its finality."

Finally, we direct your special attention to the fact, as is herein above set forth, that the actual amount of loss which may or does occur in the check basin itself is not susceptible of determination from the data at hand and that in order to determine such loss with certainty, actual measurements covering a period of at least one irrigation season or such period of time as may in the premises seem necessary, should be conducted by or under the direction of the State Engineer. When these measurements are made and the resulting data compiled, we are confident that sufficient information will be available upon which your Honorable Board can base an equitable and fair decision.

We suggest, however, that some tentative settlement of
100–110 the issue should be arrived at without delay in order that the work now partly performed may be completed this spring.

Respectfully submitted,

____ ____,
State Engineer.

____ ____,
Consulting Engineer.

Attached to said report and made a part of it is a blue print of a portion of the general map of the Salmon River project on file in the State Engineer's office and approved by the State Engineer and the State Board of Land Commissioners in February, 1911, which shows the check basin as a component part of the system.

* * * * * * *

111 Plaintiffs' Exhibit 2 being a certified copy of certain Land Board minutes was thereupon identified and offered in evidence. Defendant's objection to the minutes of the meeting of November 30th, 1915, was sustained. Defendants objected to the minutes of October 15, 1917, on the ground that there was nothing therein which had any bearing upon anything involved in the case. The objection was overruled. Defendants objected to the
112 minutes of October 18, 1917, as irrelevant and immaterial and in no way binding upon the defendants, and not tending to prove or disprove any issue in the case. Whereupon the following proceedings were had:

The Court: I shall let it go in and give it consideration later. It may or may not be of any value.

Mr. Haga: And the same objection is made to the minutes of March 13, 1918, which is with reference to applying for patent to certain lands on the tract.

The Court: The same ruling.

The substance of that portion of Exhibit 2 admitted in evidence is as follows: Minutes of meeting of State Land Board of the State of Idaho held at Hollister October 15, 1917. Four members of the board being present and also Hon. Clay Tallman, Commissioner of the General Land Office of the United States and his associates, also G. M. Hall of the Salmon project and his attorney, and about three hundred settlers on the project. The Hon. Clay Tallman addressed the meeting upon his purpose in visiting the project. The water users' association appointed a committee to represent it before the Land Board and the committee. Settlers who were not members of the association also appointed a committee and the holders of desert land appointed a committee. The meeting adjourned until Tuesday, October 16th. The minutes of October 16th, 1917,
113 show that a meeting was held and the matter considered further. The minutes of October 18, 1917, show a meeting of the board pursuant to adjournment at Jerome, Idaho, with the same members present and also the Commissioner of the General Land Office, whereupon the Commissioner of the General Land Office submitted the following communication to the State Land Board:

"Jerome, Idaho, Oct. 18, 1917.

Gentlemen of the State Land Board of Idaho:

Having examined the Salmon River project, together with the Land Board, with a view of making such a readjustment as is necessary in order to permit of an application for the granting a patent as promptly as possible, to the end that the uncertainties and difficulties that have heretofore existed in connection with this project may be terminated at as early a date as practicable, I propose to you the following plan of procedure based on the facts indicated:

1. That the present available water supply for irrigation on the project on an average year, taking into consideration the use of the reservoir for storage purposes for holdover water from year to year, is estimated at approximately 78,000 acre feet at the farmers' headgates or at the measuring weirs that are used on the project. This quantity of water on a basis of 2¼ acre feet per acre as a duty of water would furnish sufficient water for the irrigation of 34,600 acres. It was indicated at a meeting held by the settlers, however, that two acre feet was sufficient for the raising of grain crops and that three acre feet would be required to raise alfalfa crops; though doubtless less than one-half of the project is devoted to alfalfa crops, let us assume for the purpose of argument that approximately
114 2½ acre feet on the land are needed for the deversified crops, considering the peculiar character of the soil in some portions of the project.

It appears further that a marked saving of water can be made by eliminating the so-called check basin situated just below the reservoir, by placing a canal through this basin or around it, it appearing that this basin has developed serious leakages through the lava. It is also apparent that a large saving in the water can be made by eliminating certain canals particularly the so-called west lateral. If the check basin and the west lateral are eliminated, it will bring the water supply for the farmers up to approximately 2½ acre feet per acre on the land measured at their measuring weirs for 35,000 acres actually irrigated and cultivated.

I, therefore, have to suggest that the Land Board proceed to contract this project to a total area of lands which will contain approximately 35,000 actual irrigable acres; with the understanding that this contraction shall be worked out so as to eliminate the west lateral; also that the requirements shall be made of the company or bondholders' committee that the so-called check basin be eliminated.

It is my opinion that in the course of time a less amount of water will be necessary properly to reclaim the land under this project; in other words, that a larger area can be reclaimed and irrigated from the available water supply. I, therefore, have to suggest further that whatever area is necessary be permitted to remain under segregation for some years to come, with a view of increasing the irrigated area of the project by say 5,000 acres at a later time if it shall prove that there is sufficient water supply for that purpose.

Yours very truly,

(Signed) CLAY TALLMAN."

115 Upon motion by Governor Alexander the report of the Commissioner was adopted. Upon motion by Attorney General Walters the following resolution was adopted:

"Resolved, that the total irrigable acres in the Salmon River Twin Falls Carey Act project shall not exceed 35,000 irrigable acres within the project, and that the State Land Board will not apply to the Federal Government for patent to lands within the project, which added to any lands already patented or State lands heretofore sold, or desert entries which may remain within the project, will make a total acreage receiving water from the irrigation system and within the project of over 35,000 acres.

That the State Land Board will proceed to adjust the Twin Falls Salmon River project and the Twin Falls Oakley project with the recommendations of the Commissioner of the United States Land Office, so that the acreage included in the respective projects and receiving water therefrom, will conform to the recommendations of the Commissioner of the General Land Office and the resolutions heretofore passed by this Board."

The minutes of February 4th, 1918, show a resolution unanimously adopted by the State Land Board in regard to delivery of water for 1918. They also show a resolution which, after reciting that the board had previously determined upon the number of acres for which it would request patent which would involve a material

reduction of the acreage segregated and that such reduction would result in the exclusion of certain individuals together with their filings from the project, which would result in a depreciation
116 in the value of their improvements, provided for the appointment of a committee of one to assess and determine the value of improvements placed upon all such excluded entries, which should also indicate whether the entryman was a bona fide resident of the State of Idaho at the time of the report. The minutes of March 13th, 1918, show that all members were present and that a resolution was adopted reciting the determination of the board to reduce the Salmon project to 35,000 net acres to be irrigated from the system, including lands already patented and the consideration given by the Board and its appointees to the matter, and contained the following:

"Now therefore be it resolved that it is for the best interest of said project and in the interest of sound public policy that this Board apply to the General Land Office of the United States for patent for such a number of acres of Carey Act Land as added to the acreage of the patented lands receiving water from the said project will make a total number of acres receiving water therefrom of 35,000 net irrigable acres, and

Be it further resolved that this Board does hereby adopt the report and findings as to the acreage for which patent shall be asked as reported by our representative C. W. Whiffin, and

Be it further resolved, that the Governor as Chairman and the Register as Secretary of this Board be and are hereby authorized to make application to the Commissioner of the General Land Office for patent to the lands described in said report, which is as follows:—"

The report of C. W. Whiffin referred to is contained in the said Exhibit 2 and shows the nature of the investigation made by
117 him and the basis upon which he recommended certain land for inclusion and patent and certain other land for exclusion. Portions of said letter are as follows:

"The 'A' canal waters the upper or southern part of the tract, land around Rogerson and Amsterdam, while the main canal takes a northeasterly course from the reservoir and near Hollister divides, the east branch being No. 1 canal and the west branch being No. 2 canal, and it is the latter to which Commissioner Tallman refers as the 'west lateral.' A very little investigation will quickly convince one that here on the west side under the No. 2 canal would be the first lands to be cut out. The character of the land, lack of settlement, long distance, seepage and evaporation makes the operation of this canal uneconomical to the system.

* * * * * * *

In the economy of things, I found at times that it was necessary to exclude good land with fair improvements while perhaps poorer lands with less improvements were included; but in making such selection, I had in mind the elimination of laterals, the proximity of

main canals, railroads, towns, schools, etc., also the solidarity of land to be retained, soil condition, rock, and both water and air drainage. You will note on the accompanying map that the segregation yet lacks compactness. The very nature of the land condition here accounts for this. In this upper Snake River land for countless years the up river winds have carried across the soil from west slopes, south slopes and southwest slopes to the lea side slopes leaving thin soil and exposed rocks on the former and deep soil on the latter. This is one reason, and the fact that considerable land of the segregation lies above gravity water, is another, why the tract appears so spotted."

118 The minutes of December 27th, 1918, show a memorandum of a conference with Governor Alexander and Commissioner Tallman.

Plaintiff's Exhibit 3 being certified copy of minutes of meeting of the State Land Board held March 5, 1919, was introduced in evidence without objection, and is as follows:

"Boise, Idaho, March 5, 1919.

At an adjourned meeting of the State Land Board held this morning:

All members present.

In re Protest Against Maintenance Charges on the Twin Falls Salmon River Project.

The operating company of the Twin Falls Salmon River project has heretofore in the usual manner filed its statement of maintenance charges for the year 1919, due notice of which was given as required by law, and protests were filed with the board objecting to the item of $18,000 for certain work, on the ground set forth in the protests, to-wit: that the works proposed to be paid for with said money was original construction work that should be paid for by the original construction company, and was not a proper maintenance charge, and should be disallowed by the board as such. The hearing was had before the board at the time provided in said notice.

Whereupon the Land Board instructed the State Engineer, together with W. G. Swendsen, as consulting engineer, to go upon the lands and property of said project and secure for the Land Board all the data and information necessary for the Land Board to determine the one question presented by the protest.

119 The engineers aforesaid having now filed with this board their report in writing and the board having duly and carefully considered the same, the board makes the following findings of fact:

That the original construction work on this project was done through the years of 1909 and 1910, and according to the report on file in the office of the State Engineer, 99% of the work was com-

pleted on or before December 31, 1910; that the first use of said system for irrigation was in the year 1911.

That the records of the State Engineer's office and of the Land Board with reference to the various proceedings had and things done on said project as to the particular facts required by the board in order to determine the question now before it are somewhat vague and indefinite; that the question in hand requires for decision such facts as will have to be determined by measurements of water, etc., which have not heretofore been secured; that the only records of such facts available as a basis for a conclusion by the Land Board and the State Engineer are those of the construction company and the operation company under the management of the former company and its successor, which records do not definitely segregate the losses between the check basin and other parts of the system. The losses allowable in such systems are well established and the question to be determined by the measurements referred to above will be whether the losses occurring in the check basin and other parts of this system have been and are usual or unusual, normal or abnormal. This board is not inclined to accept or base a conclusion upon the records before it because of such indefiniteness on said point and because of these records being solely of one of the interested parties and deems it necessary, in order to determine the point in issue to make certain measurements and secure other information in point during
120 the coming season of 1919 to ascertain the information upon which to base said conclusion; that, therefore, this board finds that it cannot determine said question at this time definitely, but should hold that said charge of $18,000 shall be treated as a maintenance charge for the time being, and the money provided in the assessments therefore collected as maintenance charge, and that after said measurements are determined and said additional information is at hand, the board shall make its final conclusion as to whether or not said charge was a construction or a maintenance charge; then if the board finds that the same was a construction charge, the said assessments so collected shall be applied by the construction or bondholders' company upon the contracts or purchase price of the settlers upon their respective tracts; that where the person so paying such assessment is not indebted to such company on such contract, then it shall be paid back to him in cash by the bondholder company.

We direct that all of such measurments herein proposed to be taken for the coming season of 1919, shall be taken under the direction of the State Engineer of the State of Idaho, and such information be furnished in a report to the Land Board supplementary to the report just filed in said matter.

Now, therefore, in consideration of the premises, it is by the State Board of Land Commissioners, ordered:

1. That the said protests against the said maintenance charge on the particular item of $18,000 for proposed work on said check basin of said Twin Falls Salmon River project be at this time denied and that said item be temporarily held a proper maintenance charge, and that the same shall be collected in the same manner as other

maintenance charges for the year 1919; but that this decision is not final or definite and will not be made final and
121–143 definite until the said board has sufficient information, which is to be acquired during the season of 1919, upon which to make a final conclusion as to whether or not said item should be charged as an original construction charge or a maintenance charge.

2. That upon receipt of said information, the board shall again consider said matter, and if its decision is that said $18,000 is a proper maintenance charge, then that shall be the end of the matter; but if they should decide that it is an original construction charge, then it is ordered that the portion of said $18,000 so paid by each land or water proprietor or person toward the said sum of $18,000, shall be applied by the construction or bonding company upon the amounts owing to said bonding company by each of said water users or persons paying the same on contracts or otherwise; and if any contract has been paid up so that the user or such person making such payment is not indebted to said bonding company, then the said binding company shall repay in cash to said user the amount so paid by him.

Be it further ordered, subject to the foregoing as to the $18,000 item, the said charge of $1.25 per acre as presented to the board as a maintenance charge, be and the same is hereby approved.

It was moved and seconded that the foregoing findings and orders be adopted as the finding and orders of the State Board of Land Commissioners. Motion was voted upon and an aye and nay vote taken thereon, which resulted as follows:

Governor Davis ..... Aye.
Attorney General Black ..... Aye.
Secretary of State Jones ..... Aye.
Supt. of Public Instruction Miss Redfield ..... Aye.
State Auditor Gallet ..... Aye.

* * * * * * *

144 DON H. BARK, a witness called on behalf of plaintiffs,
145–170 being duly sworn, testified, as follows:

My occupation is Irrigation Engineer in the employ of the United States Department of Agriculture. I have been so engaged seven years the first of next May. I finished a scientific course in the University of Valparaiso, Indiana, in 1901, and since that time and prior to taking my present position I was employed for part of two years by the Twin Falls Land & Water Company at Twin Falls, in connection with experimental farm work, and for one year by the Wyoming Central Irrigation Company, at Riverton, Wyoming, at which place I had charge of two experiment farms, and fifteen hundred acres that was put in as a demonstration. In the spring of 1908 I accepted my present position, and was assigned to work in southwestern Kansas. In 1909 I was detailed to work in Idaho, and have been here ever since in my present capacity.

* * * * * * *

171–199 I consider the Salmon Project the best class of construction, outside of the Oakley. I consider it the best constructed Carey Act project in the State. Taking into consideration the canals, headgates, dam and the whole works, it is certainly the best Carey Act system in the State.

* * * * * * *

200 Whereupon plaintiffs rested their case.

E. B. DARLINGTON, produced as a witness on behalf of defendants, being first duly sworn, testified as follows: I am chief engineer of the Twin Falls North Side Land & Water Company project. I was associated with the Salmon River project in several capacities. During the years 1915, 1916 and 1917 I was Superintendent of operation of the Salmon River Canal Company, Limited. As such my duties were the supervision of water deliveries, maintenance and operation. I kept the records of run, reservoir losses and
201 system losses. I have some memorandum as to those records. The run-off for 1915 was 46,383 acre feet of water measured into the reservoir. The reservoir losses were 19,951 acre feet. There was 41,657 acre feet turned into the canal system. There was some water held over from 1914. The run-off for 1916 was 108,945 acre feet. The reservoir losses were 20,685 acre feet; 83,900 acre feet was delivered into the canal system. The run-off into the reservoir in 1917 was 212,957 acre feet. The reservoir losses were 39,848 acre feet, 14,634 acre feet was turned into the canal system that year. A considerable area of new land was submerged in the reservoir in 1917 which had never been submerged,—the water was held at a higher stage and the losses are always greater on land that hasn't been previously submerged in a reservoir. We had a larger area submerged and a larger area exposed to evaporation. I haven't the record of the percentage of losses in 1915 and 1917. For 1915 the loss per acre submerged was 13.5 feet in depth per acre; in 1916, 13.6 feet depth per acre and in 1917, 17.3 feet in depth per acre. The increase in 1917 was due to the causes I have already explained. The total water delivered to the farmers' headgates in 1915 was 27,088 acre feet, in 1916 it was 54,232 acre feet, in 1917, 97,953 acre feet. I have the transmission losses in the distribution system in terms of the efficiency of the system. The loss would be
202 the difference between the amount diverted from the reservoir and the amount delivered to the farm headgates, and the ratio between those I call the efficiency of the system. In 1915 the percentage of total diversions delivered was 72.6 per cent, that would mean a loss of 27.4 per cent. For 1916 the percentage of total diversions delivered was 72.9 per cent, that would mean a loss of 27.1 per cent. For 1917 the efficiency was 71%, meaning a loss of 29%. In my opinion, the 1917 loss was greater on account of the longer period during which the water was in the system and the higher heads carried during the year. I was never directly associated with any large irrigation system before I went on the Salmon in 1909.

I was associated with this project during the period of construction. I was locating engineer at the initiation of the construction. I was afterwards assistant chief engineer in charge of construction and eventually chief engineer in charge of construction. Mr. Charles B. Smith was chief engineer during that period. Mr. A. J. Wiley designed the structures. I remember the matter of the check basin as a part of the system being taken up. I was present at a conference of engineers when that was considered. The check basin was adopted as a part of the system for what were considered good reasons at that time. In the first place, it offered a natural opportunity to check the water coming from the tunnels, which would be excessive to take into a canal system. It further offered an opportunity to
203 provide light storage and closer regulation. It still further offered the opportunity to transmit the water about two miles without construction. I was familiar with the plans and specifications approved for the construction of the system.

Whereupon the following proceedings were had:

"Q. Was or was not the check basin, as it stood when the system was deemed to be completed, by the engineers, in accordance with the plans and specifications?

Mr. Bothwell: We object to that as not the best evidence. The record is already in showing what action was taken.

Mr. Haga: The nature of the check basin is not in. The witness is simply explaining how the check basin compared with the plans and specifications.

The Court: I believe the question is too indefinite. You say when the system was deemed to be or considered to be completed by the engineers. What engineers?

Mr. Haga: The engineers in charge of the system, and by the Carey Act inspectors who were in charge on the work.

Mr. Bothwell: We object to that as not the best evidence.

The Court: Sustained.

The witness continued as follows: Since 1912 there had been a few small sinks or pipes developed in the check basin that
204 have been easy to repair and have been repaired as opportunity offered when the water was taken out of the system. They weren't of a character to jeopardize the transmission of water at the time of discovery. They were repaired between periods of water delivery when the water was out of the system. Water in general was delivered in periods of varying length, depending on the crop requirements. The plan was to run a large head of water for a short time, we will say for a period of twenty to twenty-five days, and then shut down for ten or twelve days with the idea that much better efficiency could be secured from the water by running larger heads and delivering larger heads to the farmers. Up to 1915 we delivered double heads when we could, heads and a half when the capacity of the system was taxed. By double heads I mean an inch to the acre. We had a surplus capacity and we were capable of doing that because of it. We determined the time of the runs by

investigation of the crop requirements and canvassing the demands on the tract. We tried to get the opinion of the farmers as best we could as to when the water would be most generally needed.

There were large radial gates constructed at the outlet of the check basin which controlled the flow from the basin. They were what are known as check gates in the rock cut. Below these were gates constructed for the main canal and for the "A" lateral. The
205 main check gates were to control the water stage in the check basin. The check basin was used for light storage, and it was found very convenient to use it as an equalizing basin, as well as a check basin, and use it for light storage, where perhaps several hours' run of water for the canals could be held. We were able to deliver water into the main canal and the "A" lateral about three hours earlier by having it there in the check basin than if we had to order it from the dam and reservoir, so we oftentimes kept a few tenths of storage in depth there in the check basin, as a convenience in operation. Those check gates enables us to hold the water back there. As we wanted to turn it out we raised the check gates.

There were test pits dug about every 200 feet, as I remember, around in the rim of the check basin. We contemplated at one time constructing a canal around the rim of the basin, and dug test pits with that in view. These test pits were dug on the east side. There were no test pits dug out in the bottom of the basin. We had in mind the location of a canal around the rim. That was before it was decided to utilize the check basin as such. Under the proposed improvement very little storage can be held in the check basin. Mr. Cookingham of the State Engineer's office was there on the job for the State Land Board inspecting the work at the time. I don't remember any particular conversations we had in re-
206 gard to it. He never made any objections to me. I was locating engineer at that time.

J. C. Porterfield, a witness heretofore duly sworn, was recalled on behalf on defendants and testified as follows: The amount of water run into the reservoir in 1918 was 78,460.8 acre feet. The reservoir losses were 25,988.8 acre feet, the losses per submerged acre during that year were 15.2 acre feet. The amount turned into the distribution system for irrigation was 77,898 acre feet, for domestic use there was 4,451 acre feet. I have compiled from the records of my office a table showing the amount of the run-off for the last run-off the last seven or eight years, and the amount run out of the reservoir into the canal system, and the losses in the reservoir, and matters of that kind. Said paper was thereupon marked "Defendants' Exhibit 1" and was introduced in evidence without objection. Said table is as follows:

Salmon River Canal Company, Ltd., Comparative Statement of Reservoir Action by Years.

Year.	Total run-off, a. f.	Total drawn off, a. f.	Available storage Dec. 31, a. f.	Loss in reservoir, a. f.	Per cent loss of total received from previous year plus run-off.	Mean acreage submerged.	Loss per acre.	Maximum available storage.
1911	96,571	22,843	1,520	52,070	53.9	1153	45.0	21,925
1912	169,888	62,827	44,400	64,181	37.4	1870	34.5	87,500
1913	108,405	77,341	29,150	46,314	30.3	1951	23.7	82,630
1914	135,295	108,571	17,850	38,024	23.1	1966	19.4	102,590
1915	46,383	41,657	2,635	19,941	31.4	1510	13.2	42,430
1916	108,945	83,900	6,995	20,685	18.5	1515	13.6	52,800
1917	212,957	140,634	39,470	29,848	18.1	2011	17.4	135,240
1918	78,461	82,349	9,605	25,977	22.0	1711	15.2	68,230

Compiled January 16, 1919, by J. C. Porterfield, Supt.

207 I didn't last year make any attempt to measure the amount that was run over the farmers' head-gates for domestic use. The amount delivered for irrigation purposes was 54,517.11 acre feet. The system losses during 1918 were 23,381 acre feet. The efficiency of the system was just 70% for that year, or the losses 30%. Well, I can't account for that, except in a general way, that the efficiency will vary slightly from year to year, according to the climatic conditions, the temperature of the air and the temperature of the water and the temperature of the soil, embankments, canal embankments, through which the water is running. If it is run in cool weather the losses will not be so great as during hot weather, and things of that kind. I can't say though—there will be variations from year to year through conditions of that kind.

I have had charge of the Twin Falls South Side Canal Company in the way of distributing water during the seasons 1915, 1916 and 1917. It is immediately north of the Salmon project, and is in the neighborhood of 200,000 acres. It irrigates approximately that acreage. I have never figured the efficiency of the system as closely as I figured them on this system, but I know that the losses were from somewhere from 36 to 40% on that system. I mean from the Milner dam to the farmers' head-gates. I think there is a little less than 180,000 acres cultivated from year to year. There was
208 very much more water delivered. I know I had a diversion at the Milner dam at sometimes in excess of 3,500 acre feet.

Whereupon the following proceedings were had:

Mr. Haga: What I wanted to take up was the question of the suit that is pending in the State Court, that Mr. Caldwell has referred to, which includes issues involved in this case. And I have a petition which I have hastily prepared, in relation to the issues which we have now *been* injected into this suit which petition calls for the restraining order and injunction enjoining the prosecution of that action in the State Court, and I am ready to present that matter now, if the Court please.

Mr. Bothwell: As to the restraining order, if the court is in a position to pass upon this question at this time, in reference to the check basin, we perhaps would have no objection to taking up the restraining order, although if it — just an ordinary application to restrain in the State Court, by reason of the fact that this Court has already acquired jurisdiction,—but if we could get a final determination on it now, we understand Your Honor is leaving town this evening and will be away for some thirty days or so, and to leave the situation undetermined, we wouldn't feel that we were representing our clients' interests to agree to take up the restraining order at this time. We would have to ask for notice unless the matter could
209 be determined by Your Honor, unless we could get some, at least tentatively, some ruling, unless your could give us some relief.

Mr. Bothwell: We are asking for a receiver to be appointed to go in there and complete that check basin; after they have gone ahead

and stripped the dirt off of the bottom of it and built a little ridge through it, they have come here and said that they have entered into a contract with some one, thereby laying the system open to a lien, which we perhaps would have to pay, by reason of the fact that they being in charge, the system ultimately has to come to us, and that is the relief we are asking, among other things, but we insist that a receiver should be appointed to go ahead and finish it as construction work. The record shows that this is only a part of it, that other work will be required presently, and we believe that it should be taken charge of at this time by the Court, as to that phase of it.

The Court: Mr. Bothwell says he wants to ask for a receiver. If I entertain this hearing, there wouldn't be time perhaps to hear him upon his application. I am not sure that he is in a position to apply for a receiver at the present time, but this is a new matter entirely.

Mr. Haga: Yes, it is a matter that developed under the testimony of Mr. Caldwell, during the trial of the case, that the issues which will be involved in that suit are the issues which they are seeking to have adjudicated in this suit.

210 The Court: Gentlemen, Mr. Haga has stated that he didn't desire to put on any more evidence. Do you desire to make any further application in this proceeding which has been going on for two days?

Mr. Bothwell: We desire to make an application for a receiver on the showing, renew the application which has heretofore been made on the original proceedings.

(Argument omitted.)

The Court: Gentlemen, this feature of the case presents rather a remarkable situation, and is not free from difficulty just at this time of the year. It is the first time that I have heard any serious criticism of the management of the system by Mr. Hall, and those who worked with him and those who are superior to him. Generally, apparently, the system has been operated economically and for the interests of the project. I assume that it has been recognized that if the bondholders are to get their money at all, in some way the project must be reasonably successful. Now, however, at this particular time, apparently, when the Commissioner of the General Land Office, or his representative, suggested that only a certain area would be patented, but that if certain work was done upon this check basin perhaps an additional area could be patented, the operating company, which, of course, must be recognized as ever the form may be, we can't close our eyes to the fact that the

211 trustee is in control of the operating company,—at this juncture this work is uncompleted. If I am to believe the witnesses here, there was no particular emergency; there was no sudden reason for undertaking this; so far as the safety of the system was concerned or the economy of its operation. In the earlier years, 1912, I think, a serious situation developed, and provision was made against the recurrence of that or the continuance of it, and since that time, as I construe the testimony, there has been nothing serious.

From time to time leaks have developed, but they have been very easily taken care of. Now, this work has been undertaken, a work which will mean the expenditure of a considerable sum of money, and it has gone so far that apparently it must either be completed, or there will be real danger; in other words, the earth has been borrowed from a part of this basin, thus exposing in some places the underlying lava formation, and in other places, of course, bringing the lava rock nearer to the earth surface, and unless the projected canal through the basin is completed the water, as I understand, would spread over the whole basin, and thus possibly find holes in the lava at these points where the earth is now either entirely removed or is very thin. Now, it is difficult for me to understand why this work was undertaken just at this time as a maintenance or operating expense, or maintenance or operating feature. I can
212 see why it should be undertaken for the purpose of saving water and thus increasing the availability of the water supply, and thus perhaps enabling the parties interested to procure patent to a larger area. But if that be the case apparently there was no reason why the burden of the expense should be imposed upon the settlers. If the order of the State Board here was final, if they had found that it was an operating expense, it may be that in a measure would be binding upon the Court, but there is no contention that the board so found. The board expressly disclaims that it so found. They have probably undertaken to tide the parties over this season in order to avoid a catastrop-e, but very plainly the board has not said to the parties or to the world, "We find that this is a proper operating expense, we find as a matter of fact that this is an operating expense,"—they simply said, "We will permit the company to charge it as an operating expense this year, and if it turns out not to be a proper operating expense we will require reimbursement to the farmers for what has been improperly exacted from them." Now, of course, in view of that status of the action of the board, it wouldn't be binding upon the Court at all, even assuming that an absolute finding that it was a proper operating expense would be binding upon the Court. I am loath to appoint a receiver. Of course, I wouldn't appoint a receiver, wouldn't think of appointing a receiver at the present
213 time, except for this peculiar feature. I am not sure that the parties can be protected by the appointment of a receiver.

Speaking to counsel for plaintiffs, where would the money come from, gentlemen, to proceed, if I appoint a receiver, where would the money come from to proceed with this work, which it is conceded it is necessary to do, without any delay at all?

Mr. Bothwell: It is our view, if the Court please, that receiver's certificates could be issued, which would become a first lien, directed to be a first lien against the system, for its completion.

The Court: I don't think you could negotiate a certificate unless the farmers themselves would take them. *I don't think you could negotiate a certificate unless the farmers thmselves would take them.* I don't think you could negotiate the certificates at all, Mr. Bothwell.

I have had some experience with receivers' certificates the last few years, and unless you could give assurance that you yourselves would take the certificates I am quite sure it would be futile to undertake to negotiate them, in the condition in which this system is.

Mr. Bothwell: I think, Your Honor, that the receiver's certificates could be negotiated with the farmers, in lieu of a payment which they would have to make to the trustees, and in that way they could be protected by a lien against the system.

The Court: Of course, the Court would attempt to give them a lien, but just what might come out of it ultimately might be
214 a question. The farmers might take a chance, but it would take some time. I think really a better way out of it—and perhaps this is not strictly judicial, any more than the action of the State Land Board,—I very highly appreciate the spirit in which doubtless the action of the State Land Board was taken,—however, it leaves the whole matter open, simply imposing temporarily upon the farmers the burden of doing this work, without a finding as to whether or not they are under any obligation to do it. Now, it might be that the Court shouldn't disturb that arrangement, provided assurance could be given that the work would be completed, and that if either the Court or the Land Board ultimately found that this money was improperly exacted from the farmers, it could be returned to them. But of course the order of the State Land Board gives no such assurance, and I don't know why reference should have been made to the bondholders repaying the money or reimbursing the farmers in case it was found that it was not properly a maintenance charge. How would such an order be enforced? Suppose this money is spent, how could it be gotten back from the bondholders?

Mr. Haga: I thing the view of the Land Board was that the settler should treat it as an offset on his contract, if it should be eventually found that it was not a proper maintenance charge. There is, of course, no intention on the part of the defendants to take
215 any advantage of that stiuation, and if the Court has any suggestion of what the defendants should do to make sure that they are entitled to reimbursement for it, if it should be eventually found to be a construction charge, we are entirely willing to furnish that security or give that guarantee in any form that may be satisfactory.

The Court: I am confident from what I have known of the operation of this system,—I will say this to both sides,—I am confident from what I have known of the operation of this system,—I will say this to both sides—I am confident that if this money were furnished in some other way, so as not to require the farmers to put it up it would be better for the present season at least for the system to continue in its present management. I see no reason for an inference of any kind that the present management is careless of the interests of the system. I think that Mr. Hall and those under him have shown considerable solicitude in maintaining this system and avoiding damage to it and in making the best of a very difficult situation.

We all recognize that the situation there is a very difficult one. And so far as I have been able to see, so far as this record shows, I don't think there is any disposition there to sacrifice or be careless of any interests. There isn't enough water there apparently for all of the lands that were in the project, but a receiver could not supplement the water supply. The very best that any one could
216 do is to take the water there and distribute it to the best advantage and in the most economical method, and to maintain the system against loss. One of these systems, of course, involves a good many delicate features, and great damage may be done in a day or even in an hour, and it is highly important that we avoid taking those chances. Now, the plaintiffs here, of course, speak for themselves, but they are also undertaking to speak for a large number of settlers. It may be that many of the settlers would prefer to have the present management continued, provided they were not compelled to pay unjust charges, and my present impression is that this is not properly a maintenance charge, upon the record as it stands. If the system had been completed, if there was no reason, as has been suggested by the engineers, no particular reason for this construction work at this time, if there was no particular danger if there was no great rush,—the contention is that the loss, if anything, is below the average, there was no great wastage in this basin, if there was no great emergency, no great danger, I am unable to see why this work was undertaken at the time it was. It should have been left to the settlers to do when they took over the management of the canal. I am really unable to see at the present time any purpose for doing this other than that suggested in the letter of the representative of the General Commissioner, namely, to increase the acreage, the patentable acreage upon the tract, and if that
217 is the purpose of it of course the entire benefit of it would accrue, not to these settlers who are asked to pay this charge, but would accrue to the security holders.

Mr. Haga: May I interrupt Your Honor to say that there is of course a purpose which will develop when the——

The Court: That may be, but I say so far as the record is concerned.

Mr. Haga: I realize that, and it occurred to me that possibly we should have put in some testimony on that.

The Court: The time I have here, gentlemen, to further consider this matter is comparatively short. What I would prefer to do would be to deny the application for a receiver, and to require you to furnish this money temporarily until this question is tried out, and let you go ahead with the work. It seems to me that that would be the easiest way to do it, and would lead to fewer complications than the other method, where you are exacting the money from a large number of farmers. If this money were put up by the bondholders or some party to this action, the Court here could ultimately give you relief, could protect you, if it is proper, and if it is ultimately held properly to be a maintenance charge, the Court could give you a lien against the property, and an order could be made now to that effect. If it is ultimately held, if you want the whole matter

drawn into this Court, as you suggest, in the issue you tenta-
218 tively suggested this afternoon, if you want the whole matter drawn into this Court, it will take jurisdiction of it and ultimately fully protect you.

Mr. Haga: Your Honor, of course, realizes that the defendants have not had a dollar of income from this property for a great many years.

The Court: I realize that it is a great hardship upon both sides.

Mr. Haga: It would seem that as a matter of common equity there must be something due on these contracts some time, and that the money should now be advanced by the settlers, who may eventually get credit for it if it is found not to be a maintenance charge. And that was the view of the State Board of Land Commissioners, that from the standpoint of common justice and equity, in view of the fact that the defendants have had no income and no interest on their money, they could not be called upon to put up money for a matter of this kind. If the settlers, of course, paid their interest or their principal or any part of it, the situation would be quite different.

The Court: Of course I appreciate that. I appreciate the hardship that has befallen both sides to this controversy, both the settlers and the bondholders. It is a very distressing condition. What is the maintenance charge, Mr. Haga, this year, aside from this particular item? What does the maintenance charge amount to
219 exclusive of this item?

Mr. Haga: The total budget was $50,000.00, out of which $18,000.00 was set aside for this work. That would leave $32,000.00.

The Court: What does it amount to per acre, the $50,000.00, what does that amount to per acre?

Mr. Haga: Without this the maintenance would be eighty cents an acre.

The Court: And with it it is about one dollar and twenty-five?

Mr. Haga: One dollar and twenty-five.

Mr. Bothwell: Our figures don't just correspond, if Your Honor please. You say eighty cents per share? Our computation is, Your Honor, that it is sixty cents per share, without this item of $20,000.00, $18,000.00 cash and $2,000.00 in certificates that have already been issued for maintenance for this year, for work which was done by the settlers, and the computation which we have is sixty cents per acre. As a matter of fact, it is less than that. It is less than fifty-five, about fifty-four and a half. We tendered sixty cents per acre in order to cover any contingency. That, of course, would be a matter of calculation.

The Court: According to the present plan these moneys would be paid into the hands of the operating canal company, as I understand?

Mr. Bothwell: I might say, Your Honor, that the settlers,—Your Honor spoke a moment ago,—there might be a question as
220 to all the settlers. I think we can speak with assurance to the Court that the settlers would take the certificates, receiver's certificates, if the receiver was empowered to repay those certificates from the first money collected from the water contracts, they could

be negotiated with the farmers, and in that way they wouldn't be compelled to pay this money as maintenance. They would have reasonable security for the payments which would be made.

The Court: Now, another possibility was running through my mind, which perhaps lines up with the suggestion, Mr. Bothwell. As I understand, you are not complaining here, at least you have made no substantial showing, that there has been any mismanagement of the company, outside of this one thing. You contend here that the company is trying to help itself at your expense in the matter of this improvement in the check basin, as I understand. Now, so-far as peril to the system is concerned, which is always an important consideration, you don't contend that under the present management there is any want of proper care in maintaining the system?

Mr. Bothwell: Other, if the Court please, than beginning this work at this time.

The Court: In other words, it is just this one thing that leads you to complain of the management? Otherwise, the management has been reasonably satisfactory, as I understand?

221 Mr. Bothwell: Outside of differences which would perhaps develop most any time.

The Court: So far as maintaining the system, the dam is being properly cared for and the system generally has been maintained fairly well; at least I gather that from the evidence in other cases, and you have made no showing to the contrary here. Now, suppose this work were permitted to proceed as projected, and I say this because in the experience I have had with receivers it would take some time for the receiver to get his hands on this work, and as I understand this ought to be done in the next thirty days or forty days at the outside, in order to give you water by the early part of May. Now, suppose that we draw into this Court the issue which your client is presenting in the State Court, and then require the farmers to pay this money that is being assessed on account of this improvement, but instead of paying it to the operating company, pay it to the trustee, who is a party to this suit, and charge the trustee with it, and if ultimately it is held that it is a construction charge, or at least that it is not a proper maintenance charge, it would be credited upon any indebtedness that may be due from your people to the trustee. Wouldn't that fully protect you?

Mr. Bothwell: That would not protect those who expect to recover from the trustees, who will have—there will be nothing due the trustee, to at least a large part of the acreage which must be elim-

222 inated, if the Court please, there will be nothing due to the trustee from those.

The Court: I mean, through some proper order here, compel the trustee to reimburse those persons then. In other words, it will be paid to the trustee, with the understanding and assent of the trustee that if it be ultimately held that this is not a proper maintenance charge, that the trustee will repay into the registry of the Court the amount of the fund, to be distributed to those who have——

Mr. Bothwell: What assurance would we have, Your Honor, that the trustee would have the funds to repay them into the court, after

the funds have been spent for the improvements? Mr. Haga spoke of some assurance.

The Court: Well, I assume that that assurance will be given.

Mr. Haga: I think so.

The Court: I assume that this trustee has a measure of responsibility, and could give that assurance. I am quite sure—I rather urge this, because I am quite sure that you would be disappointed in a receivership at the present juncture. It is too late to inaugurate a receivership; nobody would deal with you until you had the money. I have found it very difficult sometimes to get any credit at all upon property in the hands of a receiver, and people who have money and understand the perils of such securities simply will not consider them at all, and almost invariably the money has had to be ad-
223 vanced by parties interested, parties for whose benefit the receivership is secured. Now, assuming here that the farmers would do this, you would have to explain it to them, and it would take some time before you could get about to sell the receiver's certificates, and in the meantime the work is held up. Of course, I assume that the contractors would not proceed with this work if a receiver is appointed until the Court makes an order and the funds are at least in sight, if not actually available Even if you simply undertook to step into the shoes of the operating company, in this contract that it is shown here was made with Morrison & Knudson——

Mr Bothwell: I might suggest, Your Honor, that the receiver might be empowered, the same as the Canal Company is, in the way of collecting maintenance,—the Canal Company, of course, is empowered to shut the water off.

The Court: How would that help you, if the receiver collects this money and puts it into this canal?

Mr. Bothwell: Then if we had certificates which would be a first lien against any sum which would be collected by the trustee, make it collectible by the receiver in place of the trustee, to that amount.

The Court: Can you give this assurance, gentlemen, are you willing to, if provision is made such as I have suggested, that the money, instead of going to the operating company, go into the hands
224 of the trustee, to be expended for this purpose, and further that the work will be prosecuted vigorously?

Mr. Haga: I am satisfied that we can furnish a surety bond, either by the construction company or by the canal company or the trustee, in such a reasonable amount as may be necessary to cover that.

The Court: With that understanding, the application for a receiver wil- be denied.

Mr. Bothwell: Pardon me, Your Honor. May an order be made then along the line which Your Honor has suggested?

The Court: Yes.

Mr. Bothwell: For payment and so on?

The Court: Yes.

Mr. Bothwell: And the bond, could you fix the amount? Shall we take that up with Your Honor at this time?

The Court: I think you gentlemen can agree upon that, and perhaps you can work out a proper order in the premises.

Whereupon the case was continued for further hearing at a later date.

This cause came regularly on to be heard pursuant to the continuance heretofore had at 10:00 o'clock A. M. June 30th, 1919, the same parties and attorneys appearing as before.

Whereupon defendants asked leave to file an amendment
225 to the answers of the several defendants and also a supplemental answer, and after consideration by counsel for plaintiffs and intervenors, no objection being made, such leave was granted.

Whereupon the following proceedings were had:

Two separate exhibits were marked as Plaintiff's Exhibits A and B. 6/30/19.

Mr. Bothwell: We offer in evidence Plaintiff's Exhibits A and B, under date of June 30, 1919.

Mr. Haga: We object to those Your Honor, as irrelevant and immaterial. They relate to matters that have transpired since the commencement of the suit, and relate to the matter of distribution of water this year. The season is not over. We are only partially through with the irrigation season, and the evidence would therefore be misleading, and incompetent, and could not be a fact, but a mere estimate at best, based on conditions that existed when these notices were sent out.

Mr. Bothwell: These are notices, Your Honor, sent out by the Salmon River Canal Cmpany, signed by their superintendent, showing the amount of water which they will be able to deliver this year. One was an acre foot, and the other says ten inches now. And June 13th was the last notice. Touching the question of the duty of water at the last hearing, they didn't have any report for this year at that time, anything in the way of a complete
226 report as to the water that they could deliver.

The Court: I think I will permit these to go in, but I think you should identify them and find out just what they are, whether they are authentic, what they are, perhaps get the information from a witness.

G. M. HALL, called as a witness on behalf of plaintiffs, testified as follows: I am President of the Salmon River Canal Company, Limited, and as such have general oversight of the business. The superintendent is the man in charge of the canal and the operation of the property. He reports to me as President of the company and as chairman of the Board of Directors. He takes orders from the Board and from me as President. The paper marked "Plaintiffs' Exhibit A 6/30/19" is the notice being sent to the stockholders of the Canal Company under the joint direction of the superintendent and myself. Plaintiffs' Exhibit "B" of the same date is a notice to water users sent out by the superintendent with my knowledge. The company has been delivering water in accordance with the terms of those notices.

Whereupon Plaintiffs' Exhibits "A" and "B" were offered in evidence and admitted over the objection of defendants. Said exhibits are as follows:

227 *"Notice of Allotment and Delivery.*

Salmon River Canal Company, Ltd.

To water users:

Water deliveries will begin Monday, May 26th, for the irrigation season of 1919.

The first allotment for the season is made at one acre foot per acre for each share on which maintenance charges have been paid in full, the water delivered to be put to beneficial and economical use. An additional allotment may be made later should the run-off for June justify.

This allotment is based on an anticipated demand for water on 45,000 acres. The present indications are not favorable for the total allotment of to exceed 15 inches per acre, and it is possible that it may not reach that amount.

With ordinary weather conditions the first run will probably continue about three weeks. Crop and weather conditions will determine the time when the second delivery will be made, but it will probably be in the latter part of June and the month of July. It will continue until each person has used his allotment and the head in the reservoir is so low that no further allotment or delivery can be made.

Orders for water should be placed with the riders as soon as possible. Deliveries will be made at any reasonable rate that may be requested, subject to the carrying capacity of the system.

J. C. PORTERFIELD,
Superintendent."

Hollister, Idaho.
May 20, 1919.

228 *"Notice to Water Users.*

Salmon River Canal Company, Ltd.

Hollister, Idaho, June 13, 1919.

Owing to the fact that the run-off has fallen very much below expectations so far this season, it now appears that we may be 6,000 acres feet short of having sufficient water to meet the allotment that has been made of one acre foot per acre.

We will, therefore, make no deliveries beyond ten inches per acre until all users have received up to that amount, or until the run-off increases materially above present indications.

Water will cease running on the Amsterdam ride, Sunday, June

15th; on the Rogerson ride Tuesday, June 17th; and on the balance of the tract Friday, June 20th.

Deliveries will be resumed Friday, June 27th, and continue until about July 8th, when it is now expected the reservoir will be practically emptied.

J. C. PORTERFIELD,
Superintendent."

The testimony of the witness continued as follows: On the date of the first notice, May 26th, the run-off for the season had not been ascertained, by June 13th, the date of the second notice, the run-off is pretty well along although there would be run-off during the entire summer, the balance of June and the month of July especially. These notices are merely estimates or forecasts. They are based on the amount of water in actual storage at the time of the notice and an estimate of the probable run-off during the
229 balance of the season. If the run-off exceeded the run-off the balance would be delivered; that has happened in previous years. Whereupon it was admitted by counsel that the run-off for the year 1919 was below normal and the witness further testified that there is a general shortage of water in other streams in southern Idaho this year. The testimony continued. Those are the best estimates we have now.

G. M. HALL, called as a witness on behalf of defendants, having been duly sworn, testified as follows: I have been in charge of the Salmon project since about June, 1914. Mr. E. B. Darlington was superintendent of the canal up to the fall of 1917 and Mr. Porterfield has been superintendent since that time. Between 1914 and 1918 the dyke around the sink holes in the check basin was raised and strengthened by additional rip-rapping and by putting timber booms around the rip-rapping and small holes which have developed were dug out and puddled and filled in with good material to stop the leaks and eliminate the hazards of breaks. The breaks that occurred before my connection with the project showed faults in the lava formation and that the hard plan over the lava had broken through into quite a large cavity or opening, and there was a possibility of similar breaks developing in the remaining part of the basin. It is my recollection that all of the work done which was of rather a minor character was done out of the maintenance fund by the Canal Company. I took up with Mr. Robinson, the Presi-
230 dent of the Twin Falls Salmon River Land & Water Company the question of that company doing further work on the check basin. We reported to him very fully in regard to the 1912 break and the hazard of similar breaks which might possibly require a shut down during an irrigation period, and transmitted to him the recommendations of the superintendent and engineer of the Canal Company in regard to cutting off a portion of the basin by building banks through it. I think I talked with him about that on one of Mr. Robinson's trips to Idaho. The matter was first discussed in the late fall of 1914 and again in the winter of 1914 and 1915. The

letter I have produced is a carbon copy made at the time the original was made of the letter which I sent to Mr. Robinson on that date and I enclosed a copy of a letter from Engineer Darlington recommending improvements. Said letters were thereupon marked "Defendants' Exhibits A and A-1, 6/30/19" and were offered in evidence. Said letters were objected to as incompetent, irrelevant, immaterial and self-serving, and the Court sustained the objection and allowed an exception thereto. The Court further ruled that letters from Mr. Robinson with reference to the same matter were to be excluded. Before undertaking this work in the fall of 1918 the matter was again taken up with Mr. Robinson by correspondence.

231 The witness continued as follows: When this work was undertaken in the fall of 1918 it was undertaken by the Salmon River Canal Company, the Land & Water Company made no advancements or contributions toward that work. Upon further objection to evidence in regard to communications relating to the check basin matter from Mr. Robinson, the Court ruled that the correspondence might go in for the purpose of disclosing the motives of the parties in doing the work at this particular time.

The witness continued as follows: The matter of doing this check basin work was not discussed by itself with the settlers any more than other features which they were contending for. The matter of the acceptance of the works was taken up with the Land Board and on such occasions representatives of the settlers were present, and in those discussions and protests the matter of the check basin came up prominently. I took up with Mr. Robinson the matter of building the canal through the check basin about October 26th, 1918. I have a carbon copy of the letter written at that time which was made at the time the original was made, attached to it is a copy of the report of canal superintendent Porterfield in regard to the check basin work. That is the original report from Porterfield. Said papers were thereupon marked "Defendants' Exhibit B, 6/30/19." The Court ruled that the objection would be sustained but the letter might come in in order to present the matter to the appellate court. Said exhibit is as follows:

232 August 26, 1918.

"Mr. A. C. Robinson, President,
Pittsburgh, Pa.:

Check Basin—Elimination of.

We have your No. 1101 in reply to our No. 2951 of Aug. 7th, and note you do not think it expedient to make any allowance to the Canal Company on its notes to the Salmon Company at this time in connection with the building of a line around the check basin, and also suggesting the present application to the Canal Company of any available cash on its notes to the Land & Water Company.

We have collected $2,122.61 of delinquent maintenance this year, which could be properly applied on this indebtedness, but it would seem to us as if 1918 collections should not be diverted for

this use, as the estimate of expenditure published and submitted to the Land Board did not include this item, but, on the other hand, did contain an item of $8,000.00 for general repairs, upkeep and operation.

We enclose Mr. Porterfield's report and estimate, and it may be difficult to arrange for the work even should all of the canal funds be used except what must be reserved to care for fixed salary charges.

On August 1st the canal balance was $13,239.70 above July Pay Roll and invoices: we estimate $5,500.00 as required up to the end of this year for wages of regular men, rent and automobile expense. This looks as if around $7,000.00 could be used for this improvement, if no payment was made on note indebtedness. The work will run above this, the estimate on the line recommended being $11,225.00, but it may be possible to get farmers to furnish teams and feed and apply on 1919 assessment, if the Canal Company paid the men and furnished board.

It seems to us that this work should be done this fall, and that the elimination of the hazard of this check basin would be
233 popular with the settlers, even if paid for out of the Canal maintenance fund, leaving any question as to the liability of the Salmon Company for adjustment by negotiation in the future.

Superintendent Porterfield desires to do this work this fall, and it will not be easy to satisfy him that it is not the thing to do.

It was to have funds for this or other improvements that we worked for a maintenance charge of 75c per share, and it goes without saying that the Land Board would not have approved the charge at 70c had the estimate included an appropriation for any payment on indebtedness to the Land & Water Company.

We do not mean to be too insistent regarding this matter, but we do not want to undertake to go through another season with the hazard of a break which might interrupt water deliveries for a number of days.

If approved by you we could arrange to build at least the east bank this fall, and if funds were not available for the west bank until spring that portion of the work could be deferred until then, and met from 1919 assessment. The west bank is not so heavy nor is there any particular hazard, even should the water get through or over it—in fact, Mr. Porterfield has suggested as a proper construction, leaving a spillway at the upper end of the west bank into that portion of the basin cut off, as a factor of safety against a high water level in the check basin as so materially reduced in size and capacity.

Yours very truly,

G. M. HALL,
General Manager.

G. M. H.-G.
Enclos.

Memorandum.

No. 1044.

Salmon River Canal Company, Ltd.

Hollister, Idaho, August 23, 1918.

To Mr. G. M. Hall, President,
Hollister, Idaho.

234 Elimination of

Report of Mr. J. C. Porterfield.

Check Basin.

I have made a fairly accurate survey of the check basin, with a view of eliminating the objectionable features of the same, as much as may be found consistent with the necessity of having something of this kind for operating purposes.

At full head the check basin covers somewhere in the neighborhood of 100 acres, at a maximum depth of a little over 10 feet.

The bad features of it are mainly as follows:

1. There is an unnecessarily large area exposed to seepage and evaporation.

2. A considerable portion of the basin, 20 or 25 acres, lies below the grade of the outlet canal so that it never drains. This soaks away between deliveries and must of course be filled up again before any water can be run through the canal system.

3. A large amount of the bottom, particularly the northeastern part, is extremely poor in character, developing holes of various sizes every time there is a run of water. These not only add to the usual and expected seepage losses, but sometimes open up to such an extent as to necessitate the shutting down of the system for repairs. This is not only expensive as a matter of maintenance, but is extremely hazardous as to being able to properly deliver the required water to the growing crops.

The basin cannot be expected to improve as far as this feature is concerned. Under a thin layer of comparatively impervious soil lies a formation that is gradually becoming *ing* softened so that it gives away—allowing the soil to settle, and consequently it and the water to escape through the fissures in the underlying lava.
235 This can never be finally remedied with the basin as it is now until all of the fissures have become operative—discovered and permanently sealed.

The only advantage of the check basin,—and this amounts to almost a necessity, is that it serves as a regulator for the discharge of

the water from the main reservoir. The daily demands cannot be measured with sufficient accuracy by the gate openings at the reservoir, nor can the gage between the two tunnels be depended on too closely when the discharge is increasing or decreasing. For the close regulation we must continue to depend on the gauges and gates at the head of the "Main" and "A" canals. The check basin serves then as a reservoir which makes possible the required regulation at these headworks. It is not necessary to have so large a reservoir, nor nearly so large, but it is necessary to have some.

Generally speaking, the great objection to the basin is the constant hazard of operating over a bottom that may give way at any time, causing a great amount of work and shutting down of the system at a time when it will mean the ruin of the season's crops.

Possible Methods of Remedying.

In order to eliminate the basin as such, a canal must either be built through it or around it.

The east side offers the shortest route, but this lies over the worst part of the formation and is therefore not to be considered.

Around the west side a considerable number of test pits have been sunk and the formation seems to be fairly satisfactory. A canal could be constructed along a line of a 4 or 5 foot center cut that, barring a few uncertainties, would be the cheapest and most satisfactory solution—the unknown factors relate both to the expense and the
236 satisfactory results. (1) Solid rock might possibly be encountered to a sufficient extent to make it the most expensive location, and (2) formations might be cut into that would cause losses and hazard greater than we have at present.

A canal built through the heart of the basin will require over 100,000 cubic yards of material—all borrowed earth, which at present prices I estimate would cost 20 cents per yard.

Another possible solution is to reduce the size of the basin by building a single bank through the entire length. This should lie west of the center line and would eliminate all of that part of the basin that has so far shown to be really dangerous. Such a bank would require about 25,000 yards of earth and 1,500 yards of rock—rip-rap—at an estimated cost of $11,250.00.

What I consider the best possible solution is a compromise between a single bank and a two bank canal. These should be built without disturbing that part of the bottom that is still to be exposed to water.

The main bank should be built from the east side of the open cut below the second tunnel; run nearly north for approximately 1,800 feet, then northeasterly to the first rock work in the outlet canal from the reservoir. It should follow along the west side of the non-draining portion of the reservoir. From the point where the bank turns northeast a second bank should be built, cutting off what would otherwise be about fifteen acres of exposed area.

This would eliminate all of that portion that does not drain, as well as that part that is the most treacherous. There would still

remain a stretch of 2,000 feet having a width of from 200 to 250 feet and which would answer to some extent as a reserve supply for regulation, though of course to no such extent as it does at present. I think, however, it could be made to answer.

237 The east bank will contain 38,185 cubic yards and the west bank 15,438—a total of 53,623 yards. This should be built at a cost of 20 cents per yard, or $10,725.00.

A little rip-rapping should be done just below the tunnel and opposite and above the beginning of the west bank—total cost $500.00.

I should like very much to be permitted to make this improvement before another season, and I think it should be done this fall.

The only alternative I see would be, perhaps, to build only the east bank, in which case the north half would have to be rip-rapped The total cost would thus be reduced to perhaps a little under $10,000.00 and the rip-rapping could be done in the winter months, thus reducing the amount of work that would be necessary to do before freezing weather.

Contour map and cross sections of the check basin showing also proposed improvement accompanying this report will be ready in a few days.

Yours truly,

(Signed) J. C. PORTERFIELD,
Engineer-Superintendent.

J. C. P.-G.

Memo. re Above by G. M. H.

(The west bank could be omitted for the present, cutting out 15,000 yards—in that event the east bank would require riprap protection against wave action and the southwest winds being heavy and the north part of the basin remaining having a width (max.) of approximately 600 feet.")

We sent a telegram to Mr. Robinson dated September 4, 1918, whereupon a copy of the telegram was produced and marked "Exhibit C" and was introduced over the plaintiffs' objection. Said telegram is as follows:

238 "Decision regard improvement can not well be deferred and accomplish work this fall account time required to procure and difficulty of securing required force. If we can have the seven will undertake to do the work and not call for assistance as can defer west bank if unable to procure work again future maintenance dues."

A certain paper was marked "Exhibit D, 6/30/19" which was objected to as incompetent, irrelevant and immaterial, and the same ruling made. Said telegram is as follows:

"Pittsburgh, Pa., September 11, 1918.

To G. M. Hall,
Hollister, Idaho:

Making improvements your telegram fourth approved. Writing
A. C. ROBINSON."

In taking up this check basin matter we gave very little consideration, if any, to the letter of Commissioner Tallman written in October, 1917. The elimination of hazard in operation and providing a better assurance of continuous water supply was the reason that we urged for this work.

Approximately one hundred eighty-seven separate entries were included in the 13,000 odd acres cancelled by the State Land Board. The Salmon tract is approximately fifty miles from the Oakley project by road, probably thirty miles straight across country. I have been on the Oakley project several times. The conditions are very similar. I have a map showing the classification of
239 lands on the Salmon project as made by the State Board of Land Commissioners. It is corrected down to May 7, 1919. The entries colored green are the lands included in the Whiffin report for which the State has asked patent, or which are already patented. The red colored entries are the lands relinquished by the State in December, 1918, amounting to 24,426 acres, which includes the 13,000 acres cancelled previously. The land designated with the yellow color had been relinquished by the State prior to that time. The map also shows all of the land under contract. The figures within the legal subdivisions constitute the contract number and the class, whether Carey Act, desert, scrip or school. Desert entries are designated by D preceding the contract number. The school lands are designated by the letter S, and the scrip lands by the letters Sc. Where there is no designation the land is Carey Act. The map was thereupon marked "Defendants' Exhibit E" and introduced in evidence.

E. B. DARLINGTON, called as a witness on behalf of defendants, being duly sworn, testified as follows: I was superintendent of the Canal Company down to September, 1917. I considered the elimination of the check basin from the standpoint of operation. It was always a matter of very grave concern to me as to whether the bottom would drop out again. We had very serious difficulty in 1912. Every year we were obliged to go over the bottom and puddle and repair the small holes that developed. There were no
240 large holes developed since 1912, but were always threatening, that is the small holes were threatening to become large. I am familiar with the Oakley project and have been for eight or ten years. The altitude is very much the same. The conditions of climate and precipitation are very much the same.

Whereupon a certain paper was marked "Defendants' Exhibit F," being an application to the State Board of Land Commissioners

made December 31st, 1914, in connection with the approval of the completion of the project and tendering a form of resolution in which it was provided that on the Company's agreeing to pay an additional amount to cover the check basin and other details of maintenance that the works be accepted and turned over to the Operating Company. Objection that the same was immaterial and self-serving was sustained and an exception allowed.

Whereupon a certain paper was marked as "Defendants' Exhibit G, 6/30/19", being a certified copy of protest filed by the Land & Water Company on March 12, 1918, against the proposed action of the Board in relinquishing certain lands in the project, and in approving the Whiffin report. This was objected to as incompetent, irrelevant, immaterial and self-serving by plaintiffs, and after argument and a statement by counsel for defendants that they contended
the action of the State Board was arbitrary and unauthorized
241 in the way they selected the land, and that the action of the
Commissioner of the General Land Office was invalid. The Court admitted the same in evidence. Said protest is as follows:

To the Honorable the State Board of Land Commissioners of the State of Idaho, Boise, Idaho.

GENTLEMEN:

The undersigned, Twin Falls Salmon River Land & Water Company, respectfully protests against the proposed action of this Honorable body in making application to the United States for patent on the Twin Falls Salmon River project of any amount of land less than the entire acreage of Carey Act land for which water contracts are outstanding and on which final proofs have been made to, and accepted by, this Honorable Board, and in relinquishing to the United States any such land as aforesaid for the following reasons:

1. Because this Honorable Board has no jurisdiction, power or authority to relinquish to the United States, lands entered under the Carey Act within this project upon which final proofs have been made and accepted and upon which water contracts with the undersigned are outstanding.

2. Because the proposed action of this Honorable Board will result in the confiscation of the rights, interest and property of the entrymen whose lands are proposed to be relinquished and whose lands are not to be included in the application for patent and such entrymen have expended large sums of money on said lands, and in particular the following amounts:

Paid to the State of Idaho, fifty cents per acre on 20,450 acres	$10,225.00
Paid to Twin Falls Salmon River Land & Water Company on water contracts approximately	$134,217.81
242–251 Paid for permanent improvements at least $10 per acre for 20,450 acres	$204,500.00

3. Because the proposed action will result in the destruction of the lien of protestant under outstanding water contracts and under the Carey Act laws of the State of Idaho, and the United States in the average amount of $40 an acre for 20,450 acres or an aggregate of $818,000.

4. Because the entire question is involved in an action now pending in the United States District Court for the District of Idaho, Southern Division, in which the undersigned is complainant and the respective members of this Honorable Board are defendants, and said action has been tried and is now awaiting decision and the undersigned respectfully refers to the pleadings and evidence in said action and the entire record therein for a more full and complete statement of its position on such proposed action.

Respectfully submitted,

TWIN FALLS SALMON RIVER LAND & WATER COMPANY,
By G. M. HALL,
Vice President and General Manager.

Dated this the 12th day of March, 1918.

* * * * * * *

252 DIETRICH, *District Judge:*

The cause has been once before partially tried out (225 Fed. 584), and upon appeal the interlocutory decree then entered (Nov. 29, 1915) was modified, with direction for further proceedings (May 7, 1917; 242 Fed. 177). Unfortunately the hope expressed by the appellate court has not been realized, and time has brought little solace either to the farmers or the bondholders, and apparently little light to the courts and other tribunals to which the parties have resorted for relief. The facts set forth in the reported opinions need not be repeated, and a brief recital of subsequent proceedings will disclose the present status of the controversy. Apparently for reasons easily understood by anyone appreciating the difficulties attending the solution of the problems involved, both sides have been comparatively inactive. The mandate from the Circuit Court of Appeals came down October 25, 1917, and on January 3, 1918, defendant presented its motion for a modification of the decree in accordance with the direction thereof. This motion was granted, and an order vacating the injunctive provision of the original decree was entered January 4, 1912. Presumably recognizing the wastefulness, if not the futility, of pressing foreclosure proceedings while certain
253 general questions herein involved remained undetermined, the defendant has not sought to have tried the pending cases, and without objection submitted to the entry of an order on April 22, 1918, restraining it from commencing additional suits. It has also invoked the pendency of this action as a protection against damage suits brought or threatened by the farmers. Efforts to work out a settlement out of court having been unsuccessful, the parties brought

the cause on for hearing in June, 1919, at which time, during the progress of the trial, it became necessary to have further postponement in order to enable the defendants to adduce certain additional evidence. A few of the settlers, appearing by separate counsel, were permitted to intervene (Feb. 10, 1919), but the intervention brings no new issue into the case. Of more importance are the matters exhibited by the defendant's supplemental answer, filed June 30, 1919. From this pleading and the evidence adduced in support thereof, it appears that since the former trial, upon notice, the State Land Board duly cancelled entries upon the tract aggregating approximately 13,000 acres, thus reducing the area for which there are outstanding contracts to 60,170.8 acres. Still later, after an investigation made cooperatively, the State Land Board and the Interior Department joined in the conclusion that the water supply available was sufficient for the irrigation of only 35,000 acres,
and apparently agreed that application would be made and
254 granted for patent for that acreage and no more. It was
further thought that only in case the lands to be irrigated were in a compact body would the water supply be sufficient for that area, and accordingly, regardless of the priority of the dates of water contracts or entry, and also of reclamation and improvement, representatives of the Interior Department and of the Land Board selected entries in compact form aggregating in gross approximately 39,000 acres, 4,000 acres thereof being waste or non-irrigable, and this land the State Land Board has asked to have patented, it being the intention, so it is alleged, to exclude the residue of approximately 21,000 acres from the project, and to relinquish all claims thereto, although some of the entries embraced therein are earlier in time than some of those retained, and some are reclaimed and highly improved, while some of the tracts embraced in the patent application are practically in their virgin state. In a separate proceeding, brought primarily to compel the State Land Board to accept its storage nad distributing system, the defendant Land and Water Company, by a supplemental complaint, set up and assailed the proposed action as being unlawful and arbitrary (Twin Falls Salmon River Land & Water Company vs. Alexander, et al., decided January 3,
1919; (— Fed., —). Here by their amendments to their
255 several answers a similar position is taken, but in the argument views opposed to each other have been urged in their behalf.

In the case of Rayl vs. Twin Falls Salmon River Land & Water Company, cited in the opinion of the appellate court (242 Fed. 192), a rehearing was subsequently granted by the Supreme Court of the State, the personnel of which had in the mean time changed, and upon reconsideration the views expressed in the original opinion were somewhat modified (166 Pac. 232). The case cited (inadvertently, it is thought) at the head of the reported opinion of the Circuit Court of Appeals (242 Fed. 178), in 231 Fed., at page 769, involves a discussion of the nature of the interest of a construction or promoting company in the physical properties of a Carey Act project. Otherwise it is without relevancy.

At the former hearing it was held that the promoting compan did not sell merely an indefinite undivided interest in the systen but a specific water right of one one-hundredth of a second foot pe acre, flowing for a sufficient length of time during each irrigatin season to supply the farmer's needs, which it was thought the partie had agreed were two and three-quarters acre feet delivered at th farmer's headgates. The appellate court was of the view that eithe party is bound by the clause in the contract referring to two an three-quarters acre feet per acre, but in all other respects the conclu sions below were affirmed. Among other things it was said

256 "But we cannot at all agree to the contention on the part o the appellants (defendants) that no specific amount of wate was sold to the settlers; for, turning to the contracts, it is seen tha the construction company did, by paragraphs IV, VIII, and X, o its contract with the State, in effect expressly promise and agre that the water rights of the respective settlers should be one-hun dredth of a second foot for each acre of land to be irrigated," etc True, it also stated that the flow was not necessarily to be con tinuous, but clearly if the agreement is for some "specific amount' there must be a definite standard or rule to which the question o when the water is to flow can be referred. Any "amount" of wate must, of course, have three dimensions, and it will not be assumed that the appellate court intended to mock the settler by declaring that he is entitled to a "specific amount" and at the same time hold ing that his right is limited to a stream having breadth and depth but no length. Manifestly, in such a view the company's wate supply, whether large or small, would be susceptible to division into an infinite number of rights and the settler would have in effect an agreement only for a proportionate interest in the system and its available water,—a theory expressly repudiated by the Court. Moreover, if the promoters are bound by their contracts to furnish water at the rate of one-hundredth of a second foot per acre,

257 flowing only for such length of time as they may choose to deliver it, manifestly their available supply, however small, would be ample to meet all their obligations, for 75,000 or 100,000 acres, or for the 150,000 acres for which the project was originally designed, and the injunction against further sales approved by the appellate court would be wholly indefensible.

When the various contracts were entered into doubtless all parties contemplated and it was mutually understood that an ample supply of water would be furnished. Not only is such conclusion to be inferred from the contracts and the surrounding circumstances, including the representations put out by the promoters in their advertising matter, but the State Board and the promoters actually knew, and the settlers at least presumptively knew, that at the very foundation of such a project was the requirements of the federal act that "an ample supply of water" be "actually furnished" in a "substantial" irrigating system, and that unless this condition is complied with no patent will issue and the project must fail. Hence, reading into the written instruments the statutory pro- visions relatively to which it has been held by the courts both

parties must be deemed to have contracted, we have the agreement that the settler should receive water at the rate of one-hundredth of an inch per acre, flowing for such period or periods during the irrigating season as will furnish an ample supply of water
258 for the irrigation of his land. This also seems to be the view of the Supreme Court of the State for in the opinion upon rehearing in the Rayl case (166 Pac., page 232), after referring to a section of the state statute, the Court says: "But reading this law into the contracts, it would follow that the settler is entitled to receive the amount of water specified in his contract to the extent necessary to irrigate the crop or crops which he cultivates in accordance with the usages of good husbandry." If, therefore, the contract was to furnish an "ample supply" or "a necessary amount" for the farmer's needs, and if we reject as not being binding upon them the estimate of two and three-quarter acre feet, which at the former hearing it was held the parties understood and agreed should constitute such "ample supply" or "necessary amount," obviously what is such a supply or amount becomes an open question of fact, in all material respects the same as that which the courts must of necessity answer in the ordinary water suit brought to determine the extent and dignity of conflicting claims under several appropriations from a natural stream.

The phrase "ample supply of water" it is thought should be understood as meaning a sufficient supply for the farmer's reasonable needs. Doubtless Congress contemplated, and the parties hereto in contracting had in mind, actual, not theoretical, conditions, and customary rather than exceptional irrigation practice.
259 "Economic duty" of water may be a comparatively new phrase, but in reality it expresses no new idea, for fundamentally it means the duty of water when reasonably used. In other words, in the production of crops there must be a reasonable relation between the factor of water and other factors contributing to the result. The lavish use of water in order to economize in land and in labor may be wasteful of water; so the lavish use of labor and land and capital to get the highest possible return from a given amount of water may be wasteful of capital and labor. A reasonable relations must be maintained. So it does not follow that the application of water ceases to be economical or reasonable immediately upon reaching the point of diminishing return. Let us assume a case where the return increases up to the application of one and one-half acre-feet, and thereupon begins to diminish, but continues to be substantial up to the use of two and one-half acre feet. Manifestly it costs just as much in labor and money to acquire the land, fence it, put upon it a dwelling house and other necessary buildings, clear it of sagebrush, level and ditch it, and plant and cultivate the crops, whether the smaller or the larger amount of water be applied. Hence the only charge against the diminishing return is the cost of the additional foot of water, together with a slight expense of applying it. But upon this part of the return and upon it alone may depend the farmer's
260 success, for the entire product realized from the application of the one and one-half feet may be absorbed or more than

absorbed by the enumerated expenses, which are unavoidable whether much or little water be applied.

Practically we must take as the standard, prevalent approved irrigation practice under similar conditions, or, as put by the Supreme Court of the State in the Rayl case, "the usages of good husbandry." Water could be saved by distributing and applying it through underground, impervious conduits, but such is not the practice in Idaho, and the cost it may be assumed would be prohibitive. The State authorized, and the promoting company built, a system of open ditches, in the earth, of materials locally available. A more rigid requirement is not to be imposed upon the farmers. Indeed, no serious criticism is made by the defendants of the means of distributing the water or the method of applying it or of the condition of the farm lands. It may be doubted whether any other irrigated tract in the state exhibits better preparation of the land or a more scientific method of applying water.

As to precipitation, it should require no evidence to establish the fact that in a hot and arid region light, irregular rains in the summer season are at best of no benefit, and are often detrimental, in that they may encrust the surface of the earth and thus contribute to the more rapid evaporation of the moisture from the sub-soil (see testimony of Don Bark). Of course, snows and winter rains
261 are of value, if the supply of water therefrom is sufficient at any one time to penetrate the ground to a considerable depth, and substantial spring rains may be helpful in starting the crop without preliminary irrigation. But generally speaking, it would be unscientific to draw any inference merely from the total annual precipitation. An aggregate of twelve inches coming in very small quantities throughout the year might be of no value, whereas half that amount falling in a short period during the ir-igation season might be one hundred per cent effective. So too, to be a factor in our present consideration, the precipitation must necessarily be regular and dependable. A heavy rain in July every year, or possibly in four years out of five would be of value, but such a rain in one year out of five would be negligible, for any irrigation system adequate for the other four years necessarily would be adequate for the fifth year, with or without rain.

As is to be expected, where a question is involved so incapable of absolute demonstration, and at the same time of such profound importance to the parties, the testimony takes a wide range and exhibits great diversity of personal opinion. With the possible exception of public officers, witnesses with scientific training testify as paid experts and are often without experience in practical farming, and some of them base their general conclusions upon meager
262 experimentation, carried on under artificial conditions; and upon the other hand, the practical farmer has seldom experimented for the purpose of determining the maximum or minimum amount of water that can be advantageously used, and of course the farmers from the particular project here have a personal interest in the issue. A striking illustration of the disposition to generalize from inconclusive experience is to be found in the testimony of the first

group of witnesses produced by the defendants. These witnesses, connected in one way or another with the Garland project, in Utah, or with the Oakley project, in this State, which was promoted about the same time and by the same interests, and apparently has the same infirmity as the project under consideration, testified quite positively to the effect that in raising alfalfa not more than an acre foot or foot and a half of water can be applied without injury, and that from three to four tons per acre *is* a maximum crop. The witness Holmbran, for example, uses thirteen or fourteen acre inches and gets about four tons from three cuttings, and is very positive *than* more water would diminish the yield. Apparently these witnesses have used the water available and have never tried out a larger amount. Upon the face of it their testimony would appear to be so contrary to common knowledge of irrigation practice and crop yield in this section that it should be rejected. But confining ourselves strictly to the evidence of record, following this testi-
263 mony the defendants themselves called J. S. Welsh, a graduate in agriculture, and superintendent for several years of the Gooding Experiment Station, a governmental agency engaged in experimenting in methods of tillage and irrigation, at Gooding, near lands under consideration. In general his experiments with alfalfa show that the more water intelligently applied the greater the yield. In the case of three applications, aggregating one and two-tenths acre feet (small fractions are ignored) there was a yield of three and eight-tenths tons. This approximates what the witness Holmbran held to be the maximum feasible application and the maximum yield; but in five other experiments under like conditions, with increasing amounts of water, there were increasing yields, the maximum application of three and eight-tenths feet yielding six and eight-tenths tons of hay. And, what is highly significant, the last four-fifths of a foot yielded one and one-fifth tons. We therefore have an actual demonstration of the fact that more than twice the amount assumed by these other witnesses to be the maximum, may be beneficially applied, and that what they supposed to be the maximum yield may be doubled.

Furthermore, in considering the efficiency of different amounts some deduction must be made from the returns following the first application, on account of the yield which presumably would
264 be realized were there no irrigation at all. What that would be in the case of alfalfa does not appear, but in the case of wheat it seems that the unirrigated lands sometimes yield as high as twenty bushels to the acre, and the average at the Gooding station was about ten bushels to the acre. It is therefore fair to assume that without irrigation alfalfa would make at least one light crop.

It is still further to be borne in mind that in the reports of these experiments reference is made, not to the gross amount, but only to the net amount of water actually applied to and absorbed by the soil. The water was measured at the point of application, and all waste was measured and deducted. Admittedly even under the best irrigation practice in actual farming, necessarily a substantial amount of water escapes from the land, both from the unavoidable surface

drainage and from deep percolation, and there is necessarily a percentage of loss in the farmers' ditches which convey the water from the point of measurement on the system to the point of actual application. I have referred to one of the experts for the defendants; let me also refer to the testimony of one called by the plaintiffs. Don Bark seems to have enjoyed unusual opportunities for qualifying himself to speak in respect to the specific question at issue, for to what would appear to be a fair scholastic training he adds the knowledge and experience derived from experimentation and in-
265 vestigation in Idaho territory upon an exceptionally broad scale. He co-operated with Welch in the public service, but his investigations took wider range. Welch's view appears to be that under conditions existing at Gooding, substantially like those with which we are here dealing, the net amount to be applied for alfalfa is from two and a half to two and three-quarters acre-feet, and about one and one-half acre feet for spring grain. (He did not venture an opinion as to what would be a reasonable additional amount to be allowed for necessary loss from surface wastage and deep percolation in practical farming.) Bark substantially concurs in this view and states that in addition to the natural precipitation two and one-half acre feet actually retained upon each irrigated acre would be the economic duty for alfalfa on the Salmon River tract, and for grain one and one-half acre feet. From a comparatively wide investigation of the subject, his conclusion was that normally about one-half the acreage in the tract would be devoted to alfalfa and other grasses requiring the larger amount, and the other half to grain, root crops, and orchards, requiring the smaller amount; and that with care and good husbandry two acre feet net would be required on the tract as a whole. To this he would add five per cent necessary loss in transmission from the point of delivery on the system to the point of application on the land, and twelve and one-half per cent for necessary wastage from the surface, and in view
266 of these and other losses, including deep percolation, necessarily incident to practical irrigation upon the tract, he is of the opinion that two and three-quarters acre feet, measured at the farmers' headgates, would be required for successful irrigation, and that a smaller supply would be inadequate.

I do not attempt to review the testimony of numerous other witnesses upon the subject, but upon a consideration of all of the evidence, I have concluded to cut down this estimate somewhat and to hold two and one-third acre feet to be the amount reasonably required for irrigation after the lands have been farmed a few years and the soil is brought to a permanent irrigable status. More probably will be required for the best results during the first three or four years of cultivation. Just what duty the Commissioner of the General Land Office and the State Board adopted as the basis of their proposed arrangement for the patenting of 35,000 acres is not entirely clear; seemingly it was two and a quarter or two and a half feet.

What amount of land will the water available in an average year,

irrigate? The estimate of the Commissioner of the General Land Office and Land Board was 35,000 acres, but this was upon the condition that certain wasteful features of the system would be eliminated, and that this area would consist of a compact body of land. The Commissioner's conclusion (as shown by his letter of October 18, 1917), that in the average year the system will deliver to
267 the farmers' headgates 78,000 acre feet of water, must have involved the assumption of a realization of these conditions, for that amount is greatly in excess of what is conclusively shown by an actual test for the last seven years. According to the records of the defendants, in only one year out of seven has the delivery equaled that amount, the average being between 56,000 and 57,000 acre feet; and the reservoir is now empty. In 1913 the delivery was 50,175 acre feet; in 1914, 73,933; in 1915, 27,080; in 1916, 57,232; in 1917, 97,953; in 1918, 54,517, and in 1919 (estimated), 33,000. There is no ground for the hope that the average run-off in the future will exceed that of the period during which the system has been operated; if any tendency can be noted, it is toward a lighter rather than a heavier regional snowfall. As was to be expected, the first years of use of the reservoir, showed substantial reduction in loss from percolation, but in time the subjacent soil has apparently become saturated and there has been little, if any, diminution of loss since 1915. The evaporation is, of course, comparatively the same from year to year. So of the distributing system, there is a limit to the silting and tightening up of the channels, and accordingly it appears that there has been no perceptible increase in the efficiency of the main canals and laterals since 1914. The loss here has approximated thirty per cent quite uniformly for the last five or six
268 years. It may, of course, be assumed that if the project were contracted in the manner suggested by the Commissioner, and the wasteful features eliminated, the efficiency of the distributing system would be materially increased. But under actual existing conditions I do not see how, on any theory, it may reasonably be assumed that the system will in an average year furnish water at the farmers' headgates in excess of 57,000 acre feet, and specifically I find 56,500 feet to be a fair estimate. As already suggested, I make no final finding upon what the system may do under changed conditions. The record is inadequate for that purpose.

It is urged that I take cognizance of, and pass upon the legal aspects of, the proposed plan of contracting the project to 35,000 or 40,000 acres. By this plan, as already explained, it is proposed to confine the use of the available water to a compact body of about 39,000 acres in area, 35,000 thereof being irrigable and the residue waste. The controlling principle upon which the plan is based is the conservation of water. Even though they have been first entered, settled upon, and improved, lands not embraced in the selected body are to be denied water and patent. Counsel for the plaintiffs contend that the Court can acquiesce in the plan suggested by the Commissioner, and through a receivership reimburse the excluded settlers for their loss, by means of a fund to be created

from collections on the water contracts for the 35,000 acres.
269 As a precedent for sequestering and applying the fund for this purpose, the case of Childs vs. Neitzel (Idaho), 141 Pac. 77, is cited. One of the attorneys for the defendants goes further, and urges that not only is the proposed plan within the power of the Federal Land Department, but that it may be made effective without any provision for reimbursing the excluded settlers for their loss. Other counsel for the defendants vigorously challenges the validity of the plan in toto, and relying upon the reclamation statutes, which require an "ample supply," and upon that provision of the State contract forbidding sales in excess of the water appropriated, contends that the only valid method of reduction is by holding to be invalid all water contracts made after the total water supply had been sold. This was the view urged by the defendants in their petition for a rehearing in the appellate court, and also is the contention formally pleaded by them in their several amendments to their answers, filed herein on June 30, 1919. It has also been tentatively suggested that the water should be awarded to the lands to the actual reclamation of which it was first applied. And still another view is that it should go ratably to all contract holders, and patent should issue to such part of the holdings as can be reclaimed and irrigated. Either of the two last named theories would seem to have better legal and equitable footing than the proposed plan, but unfortunately under neither would the
270 lands retained lie in a compact body, and hence the water supply would be less efficient. As I have heretofore held, (Twin Falls Salmon River Land & Water Company vs. Alexander et al., decision January 3, 1919; — Fed., —), if the project is to be reduced at all, the defendants could not complain of the proposed method, for it is most favorable to them,—unless, as contended by plaintiffs, they are to be required to reimburse the excluded settlers. It may be that the courts would be without the power to prevent the Land Department from issuing patent for the 35,000 acres so selected; that we may assume, but do not decide. It does not follow, however, that there is also want of power to protect the excluded settlers in the use of a pro rata share of the available water, or in the possession of so much of their entries as they have reclaimed and such water will properly irrigate. Nor do I understand that the Land Department claims the right or power to divert all the water to the selected land, but it merely proposes to patent such lands if an arrangement can be consummated by which all the water will legally and in fact be made available therefor. I am wholly unable to accept the view involved in one of the contentions made upon behalf of the defendants, that the settlers are without vested or legal rights. That would be to hold that one who first entered into a contract for water and paid in full for a right represented to be ample for the irrigation of 160
271 acres of land, and thereupon, in compliance with the law, and with the assent of the Secretary of the Interior and the State Land Board, entered a quarter section, paying the required price, and thereafter built a home thereon, and otherwise improved

and reclaimed the land and brought it under cultivation by using the water available in the irrigation thereof, the amount being sufficient so long as the cultivated area on the tract was comparatively small, can now, without any wrong doing or default upon his part, be forcibly and without compensation dispossessed of both his highly improved land and his water right, and the latter be turned over to another, who came later and has expended nothing in improvement or reclamation,—to the end only that a larger area may be irrigated, and consequently that contracts made by the promoters, contrary to law and in violation of their agreement with the State, may become enforceable. To state such a proposition is to reject it. It may be added that the view is not only at variance with the position taken by the defendants in their petition for rehearing in the appellate court and in the amendments to their answers here, but is characterized in a protest to the State Land Board, signed by the Twin Falls Salmon River Land & Water Company, through its General Manager, as a "confiscation of the rights, interests and property of the entrymen," who, the protestant goes on to say, have

paid to the State, on account of their lands, $10,225.00, to
272 the promoting company $137,217.81 on account of water rights, and have paid out at least $204,500.00 on account of improvements upon their lands.

The other view urged for the defendants, and expressly pleaded by them in the amendments to their answers, is, in the abstract, highly persuasive, and had prompt action been taken before settlement and improvements were made it might have afforded the best solution. But apparently all parties concerned,—the State Board, the promoting company, the bondholders, and the settlers themselves,—have now for years acted upon the assumption that all contract holders are upon the same footing, and it is not unlikely that, by some, at least, of the later purchasers, the principle of estoppel could be successfully invoked. However that may be, the question cannot be presently determined, for to such an issue the settlers whose rights are concerned would be necessary parties, and as to it they cannot be deemed to be represented by the plaintiffs, who can sue for a class only in relation to matters of common interest. It may be that upon investigation it will be found that some of the later contract holders have neither made improvements nor used the water. Upon a proper showing, application will be entertained to bring such parties in, with the view of adjudicating their status and possibly cutting off their claims.

As to the suggestion by the plaintiffs that the proposed
273 plan be adopted and that, through a receivership, excluded settlers be compensated out of a fund to be created from the proceeds of collections upon contracts covering the 35,000 acres, the legal obstacles appear to be insurmountable. If we assume that in the principle recognized in the Childs-Neitzel case (supra) sufficient warrant may be found for impounding collections upon water contracts for the payment of a reasonable compensation to excluded settlers, under what rule or principle of law could the amount of such compensation be determined in a manner binding upon all

parties, and more particularly how could an excluded settler be compelled against his will to relinquish his rights.

Upon the whole, my conclusion is that we may find and decree the duty of water and the amount which in an ordinary or average year the system is capable of delivering to the farmers' headgates, and direct a pro rata distribution of the available water, leaving it to the settler to recover by counter-claim, original suit, or in some other appropriate manner, the damage he suffers by reason of his failure to receive the total amount of water contracted for. It is not unlikely that with a binding determination of the meaning of the contracts and of the amount of water available and its reasonable duty, the several parties, following the leading of their own self-interest, will work the problems out through negotiation, in such a way that the water may be economically used by ap-
274 plying it to a compact body, rather than to scattered tracts of land. Clearly such a solution world be to the interest of the defendants and the settlers as a whole, and when it is once conclusively decided what rights the excluded settlers have and who must bear the burden of extinguishing such rights, if any there are, the task will have been greatly simplified.

Filed Sept. 13, 1919.

W. D. McREYNOLDS,
Clerk.

* * * * * * *

275 DIETRICH, *District Judge:*

The question is, against whom shall be charged about $20,000.00 expended during the current year in altering what is known as the check basin,—the construction company or the settlers. This unit, so called, is a natural basin of about ninety acres in area, situated a short distance below the dam, and was utilized by the promoting company as a part of its canal. Naturally the seepage and evaporation from such a unit would be greater than from an ordinary canal channel; but of more importance is the fact that as soon as it began to be used holes developed in the bottom of the basin, through which the water poured into the underlying broken lava formation. A still further loss was suffered from the fact that the basin is lower than the bottom of its outlet, and hence, when the water is shut off at intervals, as is the practice during the irrigating season, that part which cannot be discharged is lost through percolation and evaporation, and when the water is again turned in it is necessary first to fill up this reservoir with a new supply, which in turn is wasted when the source is shut off. In practice there has been inspection of the bottom of the basin from time to time when the water is off, for the purpose of discovering newly developed holes, and such as have been found have been successfully filled up, with the exception that in the earlier years one opening developed of such magnitude that it was found necessary to encircle it with a dike, and

276 thus prevent the water from reaching it. It is also to be added that by reason of the fact that the throat of the outlet was not properly constructed—it was to- narrow and too high—it became necessary to hold the water in the basin at a level considerably above that which would otherwise have been necessary, thus adding to the peril and loss arising from the defective basin.

In his letter of October 18, 1917, to the State Land Board, the Commissioner of the General Land Office directed attention to the waste in this part of the system and suggested that if the canal were built through or around the basin there would be a marked saving in water, and intimated that as a condition to the patenting of 35,000 acres it would be necessary for the construction company or the committee of bondholders to eliminate this feature. Accordingly, the following season the defendant Salmon River Canal Company, which is under the control of the promoting company and the bondholders, commenced the construction of a canal through the basin, paying the expense out of the funds collected from the settlers for maintenance purposes. In the winter and spring of 1919 the work was resumed, and the annual maintenance charge per acre for the year 1919 was increased by fifty cents an acre to cover the expense, which was estimated to be between twenty and twenty-five thousand dollars. The State Board, to which the Canal Company must submit its budget, tentatively permitted it
277 to make the collection, upon the condition that the settlers have credit for the amount thereof on the purchase price, if upon final consideration it should be held to be a construction, rather than a maintenance, charge. During the hearing here upon the merits both parties applied for restraining orders, the plaintiffs to prevent the collection of the charge, and the defendants to prevent the plaintiffs from pressing an application pending in the state court to require defendants to furnish water to those who refused to pay, and upon consideration an order was made in effect substantially the same as that of the State Board, and the question is now submitted whether or not the expense in question can properly be recovered from the settlers as a maintenance charge.

While there is testimony to the effect that the Basin has a measure of utility in operating the system, I cannot escape the conclusion that economy of construction rather than considerations of utility furnished the controlling reason for the u of the basin, instead of constructing a canal through or around it. That the system can be operated without it is conclusively shown, and so much is admitted by the defendants in their act of eliminating it. Furthermore, I have no doubt that the underlying motive for its present abandonment and the construction of canal through it is the desire to comply with the suggestion of the Commissioner of the General Land Office, and thus procure for the defendants, the Land and
278 Water Company and the mortgage trustees, the very substantial benefit arising from the increased acreage against which they will be able to collect construction costs. True, their motive is not necessarily the decisive issue, but it has an important bearing upon such issue. It must be borne in mind that they and

not the settlers are, and always have been, in control of the Canal Company, by which ostensibly the work is being done. No emergency had arisen, and there had been no substantial change of conditions for several years. It may be admitted that it would have been better construction not to have utilized the basin—that was obvious from the beginning. But when the work in controversy was undertaken the peril had not increased; upon the other hand, it did not appear to be so imminent, for during several years and until there was an opportunity for profit the defendants were content to operate through the basin, and each year's successful operation gave additional ground for the belief that there would be no serious casualty. By their proposed action they would now put the entire burden of making the alteration upon the settlers and take for themselves the benefit. In defense of their position that it is not a construction charge, the defendants rely upon the fact that the basin is delineated upon a general map of the system, made after the original contract with the State, and the further fact that in cer-
279 tain of the reports of the State Engineer and his assistant it is referred to as a part of the system. But these facts are inconclusive. It is not pretended that the State Board ever accepted, or, with knowledge of the conditions, approved of the basin as a part of the system. The maps also show rights of way for canals and ditches, but it would hardly be contended that if, in constructing a canal along such right of way an open chasm were encountered the State Board would be bound to accept the canal though it would carry no water but simply pour it into such chasm.

It has been repeatedly contended by the parties and held by the courts that in such undertakings all parties contract with reference to the law, and into their agreements must be read pertinent provisions of the statutes. Here doubtless all parties interested understood that the system contracted for was to measure up to the standard imposed by the statutes. The State was not contracting with the promoting company for part of an adequate system, but for a completed adequate system. No other construction work was contemplated. When the Land and Water Company got through there was to be nothing more to do—there was to be a system up to the requirements of the law. But under the federal statutes the water must be furnished in a "substantial ditch or channel." If, in 1918 and 1919, this basin was a substantial water conduit, then the defendants were wholly unwarranted in seeking, for their profit, to
280 change it at the expense of the settlers. If it was not a substantial water conduit, then it never was built to comply with the law, for admittedly it had been improved and was in a safer and more efficient condition in 1918 and 1919 than in 1911, when it was first put into use. The construction contract authorizes the use of "natural channels or coulees," but only when "suitable." It is to be borne in mind that we are not here concerned with the question merely whether it would be good engineering and good sense to permit water to spread over an area of ninety acres, and thus be subject to excessive evaporation and percolation. If that were the only question, possibly the State and settlers would be bound, but the de-

fendants cannot take that position, for if that were at all, as already suggested, there would be no occasion for their precipitous action at this time, and there would be no possible excuse for imposing such an expense upon the settlers against their will. They must necessarily take the position that the system is in peril, and that if it is to function normally this work must be done. The check basin being in as safe and efficient a condition now, as it was when it was first used, it necessarily follows from the defendants' own contentions that the basin never was either a "substantial" conduit, as required by law, or a "suitable" natural channel, as expressly required by the contract, and accordingly it must be held that its incorporation into, did not operate to complete, the system, and that
281 the expense of the present work is chargeable to construction rather than to maintenance.

Filed Sept. 13, 1919.

W. D. McREYNOLDS,
Clerk.

(Title of Court and Cause.)

No. 494.

Decree.

The cause came on to be further heard during the regular September 1919 term of this Court, upon the amended complaint of complainants, answer and supplemental answers of the defendants, and the petition of certain intervenors; and evidence having been duly taken and submitted and the cause argued by counsel; and it being considered that the meaning of the contract between the State of Idaho and the defendant, Twin Falls Salmon River Land & Water Company, a corporation, dated April 30th, 1908. and of the subsequent agreements referred to in the pleadings—all of uniform tenor and effect—made by said corporation with settlers and land holders, severally, by which it sold to them, severally, water rights, upon deferred payments for which it reserved liens, and also the reasonable duty of water for irrigation upon the Salmon River Carey project in Twin Falls County, Idaho, to which said contract and agree-
282 ments relate, are questions of common interest to all said settlers and land owners, who as a class are represented by the plaintiffs herein for the determination of said questions; and further, that to avoid a multiplicity of suits and the great expense of repeatedly trying out such questions where, as in actions for damages the settlers plead, or in suits brought to foreclose said liens they set up as a defense, the failure of said corporation to provide a supply of water adequate to meet the requirements of said outstanding agreements, it is expedient that said questions be determined in a single action;

Accordingly, in harmony with the views expressed in the written opinion filed herein on September 13th, 1918, it is found and adjudged that under said contract and agreements the settlers, in addition to owning a proportionate incidental interest in the irrigation system and the franchises connected therewith, are entitled to receive a one-hundredth of a cubic foot of water per acre per second of time (measured from the main laterals into their private ditches) during the irrigation season, subject to the implied limitation that the right does not at any time exceed the amount of water reasonably required for the proper irrigation of the settlers' lands according to the usages of good husbandry. That under said contract and agreements and pursuant to the mutual understanding of all parties concerned and by virtue of the law, the said defendant corporation was not
283 at liberty to sell or to contract to sell such water rights in excess of the capacity of the reservoir and conduits which it agreed to construct or of the water supply made available by it for delivery therefrom in ordinary or average years.

And it is further found and adjudged that in ordinary years and on the average water, if delivered by an approved system of rotation in such quantities and at such times as the condition of the crops and the weather may determine so as best to serve and protect the interests of the settlers and utilize the water to the best advantage, at the rate of two and one-third acre feet per acre per season is and will continue to be required for the reasonably successful production (measured by the standards of good husbandry) of crops to which said lands are *adopted* and which have been and probably will continue to be grown thereon, and which the parties had in contemplation when said agreements were made, which said amount of water is less than one-hundredth of a second foot per acre flowing continuously during the irrigation season.

It is further found and adjudged that said defendant corporation has outstanding contracts, similar to those held by the plaintiffs, covering rights as hereinbefore defined, aggregating 60,070.8 acres, all of which, insofar as the record discloses, are apparently valid and are recognized by said defendant as conferring upon all holders
284 thereof the right to receive water ratably and in proportionate amounts. Provided, that this decree shall not be construed as determining that none of the said contracts or agreements has been abandoned or forfeited or waived, or has for any other reason become unenforcible, such questions not being in issue in this suit and the necessary parties thereto not being shown before the Court. That all of the said contracts purport to be of equal dignity and all the rights defined thereby are apparently upon the same footing, and, as between settlers holding valid, existing contracts, there is no priority of right.

It is further found and adjudged that the reservoir and canals constructed by said defendant are of sufficient capacity to conserve and deliver the amount of water called for by said outstanding contracts but that the water resources which the defendant has provided therefor furnish and will furnish, 56,500 acre feet per season, and no more, measured at the users' headgates along the main laterals as in

the contracts provided; that no other water supply is now available; that consequently the system can be relied upon to furnish approximately forty per cent., and no more, of the water which the said defendant, by its outstanding contracts, agreed to sell and deliver, namely, 140,396 acre feet per season.

Accordingly it is further adjudged that in all actions, whether brought by the said defendant corporation or its assigns to
285 enforce payment of the stipulated purchase price for water rights, or by the settlers to recover damages, or of whatsoever nature, now pending or hereafter commenced, to which parties hereto (including all persons holding said settlers' contracts) or persons in privity with them, are or shall be parties the findings and adjudications hereinbefore set forth shall be binding, and shall be conclusive of the issues herein found upon and adjudged.

And it is further decreed that the said defendant corporation be, and it is hereby restrained from making any additional contracts for the sale of water rights in said system and also from waiving any right that it may now have to forfeit or otherwise terminate any outstanding contract so long as such outstanding contracts cover in the aggregate rights in excess of available water supply as said rights and said water supply are herein defined and determined. The injunctive order heretofore issued herein is dissolved January 23rd, 1920.

(Signed) FRANK S. DIETRICH,
Judge.

Filed Jany. 23, 1920.

W. D. McREYNOLDS,
Clerk.

(Title of Court and Cause.)

Order.

This cause came on to be heard during the regular September 1919 term of this Court upon the order of the Court given and
286 made in said cause on March 25th, 1919, and the motion of plaintiffs for an appointment of Receiver to take possession of, and operate the irrigation system constructed by the defendant, Twin Falls Salmon River Land & Water Company, under its contract with the State of Idaho, dated April 30th, 1908, and for making certain work and improvements upon that part of said irrigation system known as the "Check Basin," and the bond given by the said defendant, Twin Falls Salmon River Land & Water Company pursuant to said order, and the applications for restraining orders by the parties hereto, namely, the plaintiffs, to prevent the collection of a maintenance charge, and the defendant to prevent the plaintiffs from pressing an application pending in the State Court to require defendants to furnish water to those who refused to pay, and evidence having been duly taken and submitted, and the cause argued by counsel, and thereupon, upon consideration thereof, it

was ordered on January 5, 1920, that the defendants, Twin Falls Salmon River Land and Water Company, and the Salmon River Canal Company, file and serve in this cause a verified statement showing the names of all persons who paid maintenance charges for the year 1919 in the sum of Fifty (50) cents per share or acre, which was collected to defray the expenses of constructing a canal through what is known as the check basin, being a natural basin about ninety acres in area, situated a short distance below the Salmon
287–310 River Dam in Twin Falls County, Idaho.

Whereupon, the said Twin Falls Salmon River Land & Water Company and Salmon River Canal Company, did, thereafter, and within the time specified, file a report showing that maintenance charges, including said 50 cents an acre, were paid on 46,067.5 shares or acres for the year 1919, by whom the same was paid, and the number of shares for which each share holder paid maintenance, and the complainants not filing objections thereto, it is hereby ordered that the said Twin Falls Salmon River Land & Water Company pay to the respective named shareholders, or their assigns, as in said report set forth, and contained, fifty (50) cents per share or acre on the number of shares on which the same was paid as in said report specified, within thirty (30) days from the date hereof.

Signed this 4th day of February, A. D. 1920.

FRANK S. DIETRICH,
District Judge.

Filed Feb. 5, 1920.

W. D. McREYNOLDS,
Clerk.

* * * * * * *

[Endorsed:] Printed transcript of record. Filed May 28, 1920. F. D. Monckton, clerk, by Paul P. O'Brien, deputy clerk.

* * * * * * *

1 United States Circuit Court of Appeals for the Ninth Circuit.

* * * * * * *

Upon Appeal from the United States District Court for the District of Idaho, Southern Division.

Proceedings Had in the United States Circuit Court of Appeals for the Ninth Circuit.

2 At a Stated Term, to-wit, the October term, A. D. 1920, of the United States Circuit Court of Appeals for the Ninth Circuit, held in the courtroom thereof, in the city and county of San Francisco, in the State of California, on Monday, the eleventh day of October, in the year of our Lord one thousand nine hundred and twenty.

Present:

The Honorable William B. Gilbert, Senior Circuit Judge, presiding.
The Honorable William W. Morrow, Circuit Judge.
The Honorable William H. Hunt, Circuit Judge.

No. 3502.

TWIN FALLS SALMON RIVER LAND AND WATER COMPANY, a Corporation, et al., Appellants,

vs.

A. E. CALDWELL et al., Appellees.

Order of Submission.

Pursuant to stipulation of counsel for the respective parties contained in the printed transcript of record in above cause, and upon motion of Mr. Oliver O. Haga, counsel for the appellants, ordered printed transcript of record in case No. 2725, Twin Falls Salmon River Land & Water Company, a Corporation, et al., vs. A. E. Caldwell et al., be considered as part of the transcript of record in the above entitled cause, without reprinting said record in case No. 2725.

Further ordered cause argued by Mr. Oliver O. Haga, counsel for the appellants, and by Mr. James R. Bothwell, counsel for the appellees, and submitted to the Court for consideration and decision.

3 In the United States Circuit Court of Appeals for the Ninth Circuit.

No. 3502.

TWIN FALLS SALMON RIVER LAND AND WATER COMPANY, a Corporation, et al., Appellants,

vs.

A. E. CALDWELL, W. F. MIKESELL et al., Appellees.

Stipulation that Patent Has Issued.

It is hereby stipulated and agreed, by and between the parties to this appeal, through their respective solicitors, that patent has now been issued and delivered by the United States Government to the State of Idaho, based upon the application of the State of Idaho, for the Carey Act lands under what is known and referred to in the record in this cause as the "Whiffen Report"; that the Department of the Interior by the issuance of said patent intended that the water available for said project should be used for the reclamation of a net irrigable area of approximately thirty-five thousand (35,000) acres, and said Interior Department has declined to issue patent for the remainder of said Carey Act lands in said project;

It is further stipulated and agreed, that the foregoing facts, if by the Court deemed material to a determination of the questions involved in this appeal, may be considered by the Court as part
4 of the Record of this case on the appeal herein.

Dated February 8th, 1921.

S. H. HAYS,
A. N. EDWARDS,
RICHARDS & HAGA,
Solicitors for Appellants.
JAMES R. BOTHWELL,
Solicitor for Appellees.

[Endorsed:] Stipulation that patent has issued. Filed February 19, 1921. F. D. Monckton, Clerk.

5 At a Stated term, to-wit, the October term, A. D. 1920, of the United States Circuit Court of Appeals for the Ninth Circuit, held in the court-room thereof, in the city and county of San Francisco, in the State of California, on Wednesday, the ninth day of March, in the year of our Lord one thousand nine hundred and twenty-one.

Present:

The Honorable William B. Gilbert, Senior Circuit Judge, Presiding.
The Honorable William H. Hunt, Circuit Judge.
The Honorable Charles E. Wolverton, District Judge.

* * * * * * *

Order Directing Filing of Opinion and Filing and Recording of Decree.

By direction of the Honorable William B. Gilbert, William W. Morrow, and William H. Hunt, Circuit Judges, before whom the cause was heard, ordered that the typewritten opinion this day rendered by this Court in the above-entitled cause be forthwith filed by the Clerk, and that a Decree be filed, and recorded in the Minutes of this Court, in said cause in accordance with said opinion.

* * * * * * *

6 Upon Appeal from the United States District Court for the District of Idaho, Southern Division.

S. H. Hays, Solicitor for the Twin Falls Salmon River Land and Water Company,
Richards & Haga, Solicitors for the Commonwealth Trust Company of Pittsburg, Trustee, and A. C. Robinson.

Before Gilbert, Morrow, and Hunt, Circuit Judges.

MORROW, *Circuit Judge:*

This controversy was before this Court in Twin Falls Salmon River Land and Water Co. v. Caldwell, 242 Fed. 177. It relates to transactions connected with a project for the reclamation of certain desert lands in the State of Idaho under the so-called Carey Act (Section 4 of the Act of August 18, 1894; 28 Stat. 422), a- amended by the Act of June 11, 1896, (29 Stat. 434) and the Act of
7 March 3, 1901 (31 Stat. 1188) and the Act of the Legislature of the State of Idaho approved March 9, 1895, (Session Laws of 1895—p. 219); re-enacted in 1899 (Laws of 1899 p. 282) and re-enacted and codified in Revised Codes of 1898 (Sec. 1613-1634) and more recently compiled in Statutes of 1919 (Sec. 2996-3074).

The relation of the federal government to the state government in the reclamation of desert lands arises out of the fact that the federal

government owns the lands, and Congress is invested by the Constitution with the power of disposing of the same, while the state has been given jurisdiction to provide for the appropriation and beneficial use of the waters of the state which necessarily includes a use for the reclamation of such lands. In Gibson vs. Chouteau 13 Wall. 92-99, the Supreme Court of the United States said:

"With respect to the public domain, the Constitution vests in Congress the power of disposition and of making all needful rules and regulations. That power is subject to no limitations. Congress has the absolute right to prescribe the times, the conditions, and the mode of transferring this property, or any part of it, and to designate the persons to whom the transfer shall be made."

In U. S. vs. Hanson, 167 Fed. 881-884 this court held that this right extended to the withdrawal of land by the Secretary of the Interior under the irrigation act of June 17, 1902 (32 Stat. 388) which land prior to that act had been taken possession of and occupied by a settler and resided upon by him continuously with the intent to file a homestead entry thereon under the laws of the United States when the lands should be surveyed and opened to entry.
8 This was a possessory right under section 3, Act of May 14, 1880 (21 Stat. 141), but a right which had to yield to the superior right of Congress to prescribe the times, the conditions and the mode of transferring such property or any part of it and to designate the persons to whom the transfer should be made.

The absolute power of Congress over the public domain as thus defined requires that the court should carefully scrutinize the acts of Congress providing for the grant of desert lands to the states, that we may understand the conditions and limitations upon which the grant was made. The first observation to be made with respect to the Carey Act is that its purpose was to aid the public land states in the reclamation of the desert lands in such states. Without such reclamation such lands are obviously unfit for settlement, cultivation or sale. The states having jurisdiction to provide for the appropriation and beneficial use of the waters of the state for that purpose are invited by the act to cooperate with the United States in such a plan and to that end such states are authorized to apply to the Secretary of the Interior for such desert lands not exceeding one million acres in each state as the state may cause to be irrigated, reclaimed and occupied. Upon such a proper application the Secretary of the Interior, with the approval of the President is authorized and empowered to contract and agree from time to time with each of the states to bind the United States to convey, grant and patent to the state free of cost for survey or price for such desert lands. But before the application of any state is allowed or any contract or agreement is executed or any segregation of any of the lands from the public domain is ordered by the Secretary of the Interior, the State shall file a map of the said lands proposed to be irrigated and shall exhibit a plan showing the mode of the contemplated irrigation and which plan shall be sufficient to thoroughly irrigate and reclaim

said land and prepare it to raise ordinary agricultural crops
9 and shall also show the source of the water to be used for irrigation and reclamation, and the Secretary of the Interior is authorized to make necessary regulations for the reservation of the lands applied for by the states to date from the date of the filing of the map and plan of irrigation but such reservation shall be of no force whatever if such map and plan of irrigation shall not be approved. It is further provided that any state contracting under the act is authorized to make all necessary contracts to cause the said lands to be reclaimed and to induce their settlement and cultivation in accordance with and subject to the provisions of the act. But it is specifically provided that the state shall not be authorized to lease any of said lands or to use or dispose of the same in any way whatever, except to secure their reclamation, cultivation and settlement. It is further provided that as fast as any state may furnish satisfactory proof according to such rules and regulations as may be prescribed by the Secretary of the Interior that any of said lands are irrigated, reclaimed and occupied by actual settlers, patent shall be issued to the state or its assigns for the said lands so reclaimed and settled.

The Carey Act was amended by the Act of June 11, 1895 (29 Stat. 434). The amendment authorized the state to create a lien upon the lands granted for the actual cost and necessary expenses of reclamation. The amendment provides that a lien or liens is authorized to be created by the state to which such lands are granted and by no other authority whatever, and when created shall be valid on and against the separate legal subdivisions of land reclaimed for the actual and necessary expenses of reclamation and reason-
10 able interest thereon from the date of reclamation until disposed of to actual settlers, and when an ample supply of water is actually furnished in a substantial ditch or canal or by artesian wells or reservoirs to reclaim a particular tract or tracts of such lands then patent shall issue for the same to such state without regard to settlement or cultivation, but it is provided that in no event, and in no contingency and under no circumstances shall the United States be in any manner, directly or indirectly liable for any amount of any such lien or liability in whole or in part.

The legislature of the State of Idaho by an act dated March 9, 1895, provided in Section 1 (Session Laws of 1895, p. 219; (Sec. 1613 Rev. Codes; Sec. 2996 Compiled Stats.) for the acceptance of the conditions of the Carey Act, together with all the grants of land to the state under the provisions of the act, and for the selection, management and disposal of such lands, by a state board of land commissioners provided for by the act. By section 20 of the Act, (Sec. 1629 Rev. Codes; Sec. 3018 Comp. Stats.), it was provided that the water rights to all lands acquired under the provisions of the act should attach and become appurtenant to the land as soon as title passed from the United States to the state.

The facts in the case are stated by the District Court in Caldwell vs. Twin Falls Salmon River Land and Water Co. 225 Fed. 588, and by this court on the former appeal in Twin Falls Salmon River

Land and Water Co. vs. Caldwell 242 Fed. 177. It will not be necessary to restate more than a brief summary of such facts.

The agreements between the parties are attached to the amended complaint.

11 The contract between the State of Idaho, through its State Board of Land Commissioners, with the Twin Falls Salmon River Land and Water Co., the appellant herein, and hereafter referred to as the Construction Company, entered into on April 30, 1908, contemplated the construction of an irrigation system for the irrigation of approximately 150,000 acres of desert land. This estimate was based upon a report of the state engineer, which stated, among other things, that:

"The water supply will be taken from the Salmon River, the proposers holding a permit from this office to divert 1,500 cubic feet per second of time from that stream, together with all storm and flood waters. The Salmon River above the point of intended diversion has a drainage area of about 1,750 square miles, a good portion of which lies in the mountains where very heavy falls of snow occur each year. The waters available for the enterprise are unquestionably adequate for the purpose in hand and the right of the proposers is most excellent, legally considered, all adverse priorities being so small in the aggregate as to be negligible."

In a public notice issued by the Construction Company it was announced that 80,000 acres of Carey Act Lands were opened for entry under the canal system on June 1, 1908; that 70,000 acres of this land were filed on during the month of June. The notice announced that: "This tract of land affords better inducement to the homeseeker than any other tract of land in the Northwest"; that

12 "The water supply for the Twin Falls Salmon River project is obtained from the Salmon River, which has a vast drainage area on the Cassia national forest reserve. The water right is perfect and there is no land susceptible of irrigation above the Salmon tract and no water rights in contest. It carries water sufficient for the irrigation of more than 150,000 acres, in normal years, and as a rule the spring run off is far greater than the amount of water required for the irrigation of this amount of land for the full season."

The contract between the State and the Construction Company provided for the organization of a corporation to be formed at the expense of the Construction Company, to be known as "The Salmon River Land Company"; the latter was to be organized with an authorized capital stock of 150,000 shares, which amount was intended to represent one share for each acre of the land which might thereafter be irrigated from said canal. This corporation will hereafter be referred to as the "Operating Company."

The contract further provided that the State of Idaho, by its State Board of Land Commissioners, would not approve any application for filing on the land described in the contract until the person or persons so applying to the Board should furnish to the Board a true copy of the contract entered into with the Construction Company for the purchase of sufficient shares of water rights of said irrigation

works for the irrigation of said land; that said shares of water rights were to be evidenced by the stock of the Salmon River Canal Company.

The contract called for the building by the Construction Company of an irrigation system to consist of a dam, reservoir formed by the dam, tunnels, and a canal with laterals. The contract which
13 the settler was to enter into with the Operating Company provided that the interest of the settler in that company should be evidenced by a certificate showing the number of shares of the capital stock owned by the settler corresponding to the number of acres of land to be irrigated under the system. It was recited in the certificate that it entitled the owner thereof to receive one hundredth of a cubic foot of water per acre per second of time for the land described in the certificate.

There is evidence in the record tending to show that on January 1, 1915, there were outstanding contracts between the Construction Company and the settlers for the delivery of water to tracts of land as follows:

Lands claimed under the Carey Act	65,727	acres.
" " " " Desert Land Act	4,939	"
" " " " Scrip Locations	1,903	"
" " " School land locations	779	"
Total outstanding contracts	73,348	"

Minor discrepancies will appear in the following statements relating to the acres of land under separate classifications and totals but these discrepancies are unimportant and need not be further mentioned.

It appears further than the whole number of acres proved up by the settlers under the Carey Act was	44,022	acres.
Not proved up by settlers	21,111	"
Total	65,133	"
That with respect to the Carey Act lands not proven up, no cultivation had been made on	16,000	acres.
Occupied and proved up	5,700	"
Total	21,700	"

14 Deducting entries on Carey Act Lands amounting to 16,000 acres, on which there was no cultivation made, from the total of 73,348 acres for which there were outstanding contracts running to claimants holding under the Carey Act, the desert land act, scrip locations and school land locations, leaves 57,348 acres of land which had been occupied and cultivated and for which water was claimed by the settlers for irrigation under the terms of their contracts with the Construction Company.

There is evidence in the record tending to show that this acreage

is greatly in excess of the acreage for which water is available under the system, even during years of normal run off, and for that reason the settlers contended that the Construction Company had failed to comply with the terms of its agreement and accordingly they refused to pay the installments due on account of the purchase price.

The complainants asked for a decree that the amount due from each and every settler and contract holder of water rights in said irrigation system should constitute and be declared to be a trust fund for the purpose of carrying out the objects and purposes of the contracts set out in the complaint and particularly to furnish each and every acre of land having water rights appurtenant to it with an ample and sufficient supply of water as contemplated by the contracts, and not less than one half miner's inch per acre continuous flow, or 2¾ acre feet per acre, if delivered by periods upon demand of the several owners thereof, measured and delivered not more than one-half mile from the quarter section of land on the said irrigation system, and that the trust so declared and created be prior and superior to the rights or claims of any and all persons whatsoever; and that a receiver be appointed by the court to take immediate
15 possession of the irrigation system and receive and collect all sums due from all water contract holders in the system and to hold and use the same as directed by the court; that the receiver be directed to secure an additional supply of water if the same be feasible, or in lieu thereof, to reduce the area of the project to a point within the water supply so that the land remaining should have appurtenant thereto an ample supply of water for irrigation; that the water rights and contracts outside of said area and the corporate stock therefor should be cancelled and that the owner of such cancelled entries and stock be entitled to receive from the trust fund payment of all moneys paid therefor including interest and damages, to be determined by the court.

When the District Court heard this case originally the construction of these contracts between the State and the Construction Company and the Construction Company and the settlers was submitted to the Court to determine the quanity of water per acre that was to be delivered to the settlers during irrigation season. The Court determined that these contracts contemplated a right sufficient to enable the settlers to receive water at the rate of one hundredth of a second foot per acre continuously during the season of actual irrigation, the amount of which was determined to be 2¾ acre feet, measured at the points of delivery from the system into the consumers' latterals. The Court thereupon entered a decree that the Construction Company should not sell rights in excess of such available supply. The decree also restrained the Construction Company from making any additional contracts for the sale of water rights and also from waiving the right to forfeit any existing contract; and also restrained the Construction Company, together with the other defendants, from collecting or attempting to enforce payments upon such water
16 right agreements, including any overdue payments of installments on said agreements until such time as the holders thereof had been provided with the water supply so contracted for,

or given trustworthy assurance to be approved by the court that such water would be provided. The Court refused to appoint a receiver for the system.

On appeal to this court, Judge Ross, speaking for the court, stated the substance of the controversy as then presented in the following language:

"The difficulties that have arisen grow out of the fact, discovered, unfortunately, too late, that instead of the appropriation of the waters of the stream amounting in fact to 1,500 cubic feet per second, the supply, as shown by the record and according to the practical concession of the parties, was only about one-third of that amount—wholly insufficient for the reclamation and irrigation of the entire tract segregated by the Secretary of the Interior, and also insufficient, it is claimed, for at least the proper irrigation of all of the lands covered by contracts of sale issued by the construction company to settlers."

The court held that the settlers were entitled under their contracts to one hundredth of a second foot of water per acre provided such quantity could be beneficially applied, but were not entitled as a contractual right 2¾ acre feet per acre as held by the District Court since that amount was merely determined in an advance estimate made by the proposer of the plan as to the capacity of the system. In other words, it was not an agreement on the part of the Construction Company that that amount of water would be delivered unconditionally to each settler during the season, but the
17 court did hold that the Carey Act as amended required that an ample supply of water for the land should be actually furnished as a condition precedent to the issuance of the patent and that whether or not such a supply was actually furnished was a question of fact, and that all questions of fact in relation to all the public lands were matters for the exclusive determination of the officers of the land department.

This aspect of the case presented a situation to the Court which was obviously one of great difficulty in the solution of the questions involved in the issues of the case. It lead the court to say in its opinion:

"When the well known fact is remembered that desert lands after cultivation can produce profitable crops with less water than when new and that a very considerable quantity of the lands embraced within the present project have according to the record been abandoned with the possibility that more may be, it is at least to be hoped that of the remainder a success may be made for all concerned."

The court sustained the interlocutory decree restraining the Construction Company from making any further sales of water rights, but reversed it with respect to the requirement of 2¾ acre feet per acre. The court made no order with respect to the appointment of a receiver to take charge of the property and affairs of the Construction Company. Upon the return of the mandate of this court to the

District Court, the decree of that court was modified accordingly. Thereafter appellants filed a supplemental answer.

It appears from this supplemental answer that subsequent to the first trial of the case, viz: on November 11, 1916, the State Board of Land Commissioners had cancelled a large number of entries
18 made by the settlers under the Carey Act; that the area of these cancelled entries amounted to approximately 13,000 acres and that by such cancellation the number of acres for which there were outstanding contracts had been reduced to 60,170.8 acres. It appears further that on October 18, 1917, the State Board of Land Commissioners entered a further order reducing the acreage of the project as follows:

"The total irrigable acres in the Salmon River Twin Falls Carey Project shall not exceed 35,000 irrigable acres within the project, and that the State Land Board will not apply to the Federal Government for patents to lands within the project which, added to any lands already patented, or State lands heretofore sold, or desert entries which may remain within the project, will make a total acreage receiving water from the irrigation system and within the project of over 35,000 acres."

It appears that this order contemplated the reducing of the project to 35,000 net irrigable acres or a gross acreage of approximately 39,000 acres including non-irrigable land embraced within entries approved for patent and that said order contemplated that approximately 21,000 acres out of the 60,170.8 thus embraced within outstanding water contracts should be excluded from said project and relinquished to the United States and should not be patented to the State of Idaho for irrigation under said irrigation system.

It appears from a stipulation just filed by counsel for the parties to this appeal that a patent has now been issued and delivered by the United States Government to the State of Idaho based upon the application of the state for lands under the Carey Act; that the Department of the Interior, by the issuance of said patent intended that the water available for such project should be used for the reclamation of a net irrigable area of approximately thirty five thousand (35,000) acres, and said Interior Department has declined to issue patent for the remainder of said Carey lands in said project.

By an order of the State Board of Land Commissioners dated February 4th, 1918, it was recited with respect to the project
19 under consideration that its reduction to the number of acres therefore indicated by the Board would result in the exclusion of certain individuals, together with their titles from the project, which would result in a depreciation of the value of the improvements placed upon their respective entries to the point of confiscation of such improvements.

It was therefore resolved in substance that a committee of one be appointed to assess and determine the value of the improvements placed upon all such excluded entries and report the same to the Board, giving the legal subdivisions of the lands and the name of the entrymen, with items and character or value of improvements

upon such entries; and that the Land Board transmit such report to the next Legislature for their consideration.

It appears from this report that two of the appellants, viz: James W. Beauchamp and Harold M. Sims, belong to the class of settlers whose lands will be excluded from the project and that six of the appellants, viz: A. E. Caldwell, W. F. Mikesell, V. E. Morgan, J. E. Pohlman, W. C. Pond and Carl Washburn, belong to the class of settlers whose claims will be included in the project and in the applications for patents and will therefore be entitled to receive water from the system.

This situation was pleaded in the supplemental answer of the Construction Company and is supported by the evidence. It is therefore contended by the appellants that there is a conflict of interest between the appellants whose lands will be excluded from, and those whose lands will be included in, the application for patents
20 and that the appellants whose lands are to permanently remain in the project cannot represent the settlers whose lands will be excluded therefrom. It is contended that their interests are wholly antagonistic.

Upon a rehearing before the District Court additional testimony was taken as to the amount of water required to irrigate the lands embraced in the project and the court reduced its previous estimate from 2¾ acre feet to 2½ acre feet as the amount reasonably required for irrigation after the lands had been farmed a few years and the soil brought to a permanent irrigable status.

The court further found that the system would not in an average year, furnish water at the farmers' headgates in excess of 57,000 acre feet, the court finding specifically that 56,000 acre feet was a fair estimate. The court referring to the evidence upon which this estimate was based, says:

"What amount of land will the water available in an average year, irrigate? The estimate of the Commissioner of the General Land Office and Land Board was 35,000 acres, but this was upon the condition that certain wasteful features of the system would be eliminated, and that this area would consist of a compact body of land. The Commissioner's conclusion (as shown by his letter of October 18, 1917), that in the average year the system will deliver to the farmers' headgates 78,000 acre feet of water, must have involved the assumption of a realization of these conditions, for that amount is greatly in excess of what is conclusively shown by an actual test for the last seven years. According to the records of the defendants, in only one year out of seven has the delivery
21 equaled that amount, the average being between 56,000 and 57,000 acre feet; and the reservoir is now empty. In 1913 the delivery was 50,175 acre feet; in 1914, 73,933; in 1915, 27,080; in 1916 57,232; in 1917, 97,953; in 1918, 54,517; and in 1919 (estimated 33,000)."

This estimate of 56,500 acre feet upon a basis of 2½ acre feet per acre for the season reduces the area of the irrigable project to 24,214 acres instead of 35,000 acres as found by the State Board of Land

Commissioners upon the advice of the Commissioner of the General Land Office and upon which finding a patent has now been issued to the state. Whether the water available for the irrigation of the lands in this project is ample for that purpose as required by the Carey Act is, as was stated in the former opinion of this Court in this case and in the more recent case of Twin Falls Salmon River Land and Water Company vs. Davis, 267 Fed. 38, a question of fact for the exclusive determination of the officers of the land department.

The Court entered a decree that under the contracts and agreements between the settlers and the Construction Company in addition to a proportionate incidental interest in the irrigation system and the franchises connected therewith, the settlers were entitled, among other things:

22 (1) to receive one hundredth of a cubic foot of water per acre per second of time (measured from the main latterals into their private ditches) during the irrigation season, subject to the implied limitations that the right does not at any time exceed the amount of water reasonably required for the proper irrigation of the settlers' lands according to the usages of good husbandry; that under said contracts and agreements and pursuant to the mutual understanding of all the parties concerned and by virtue of the law, the Construction Company was not at liberty to sell or contract to sell such water rights in excess of the capacity of the reservoir and conduits which it had agreed to construct, or of the water supply made available by it for delivery therefrom in ordinary or average years;

(2) that the rate of $2\frac{1}{2}$ acre feet per acre per season is and will continue to be required for the reasonable successful production (measured by the standards of good husbandry) of crops to which said lands are adopted and which have been and probably will continue to be grown thereon, and which the parties had in contemplation when said agreements were made, which said amount of water is less than one hundredth of a second foot per acre flowing continuously during the irrigation season.

(3) That said Construction Company had outstanding contracts similar to those held by the settlers covering rights aggregating 60,070.8 acres, all of which in so far as the record disclosed were apparently valid and were recognized by the defendant as conferring upon the holders thereof the right to receive water ratably
23 and in proportionate amounts.

(4) That the reservoir and canals constructed by the Construction Company are of sufficient capacity to conserve and deliver the amount of water called for by said outstanding contracts but that the water resources which the defendant had provided therefor furnish and will furnish 56,500 acre feet per season and no more, measured at the users' headgates along the main latterals as in the contracts provided; that no other water supply is available and consequently the system can be relied upon to furnish 40 per cent., and no more, of the water which the defendant, by its outstanding con-

tracts, had agreed to sell and deliver, viz: 140,396 acre feet per season.

This decree is based upon the contractual obligations of the Construction Company with the settlers, and takes no account of the probable and now the final determination of the Land Department that the project shall include the 35,000 acres of irrigable land.

During the progress of the trial in the District Court the plaintiffs produced evidence relating to certain charges contained in the statement of the Operating Company submitted to the State Board of Land Commissioners. The charges relate to certain alterations in the canal system in what is designated in the testimony as a "check basin." This basin is situated a short distance below the dam and was constructed to be used as a reservoir and as part of the canal system but when it was brought into use it was found that there were openings in the bottom of the basin through which the water escaped into the underlying broken lava formation. One opening in particular was so large it was found necessary to throw a dyke around it so that the water could not reach it. It was also
24 found that the outlet was not properly constructed. The commissioner of the General Land Office in his letter of October 18, 1917, called the attention of the State Board of Land Commissioners to this waste of water and suggested that a marked saving could be made by eliminating the check basin and that this could be done by building a canal through or around the basin. This was accordingly done and the actual maintenance charge per acre for the year 1919 was increased by fifty cents per acre on 46,067.5 acres to cover this additional expense. The State Board, to which the Operating Company must submit its accounts under the state law, tentatively permitted the Operating Company to make the collection upon the condition that the settlers have a credit for the amount thereof in the purchase price, if upon final consideration it should be held to be a construction rather than a maintenance charge. This question was not placed in issue by any pleading, but came into the cases as evidence upon the general issues. The court held in a separate decree that the charge was one of construction rather than maintenance. The State Board of Land Commissioners appear to still have this charge under advisement but neither the Board nor any of its members are parties to this action. They were originally made defendants but have since been dismissed from the case by the plaintiffs.

We are of the opinion that this controversy cannot be solved between the parties to this action. It is unfortunate, but there seems to be no escape from this conclusion. All the plaintiffs do not constitute a class having a common or general interest in the questions to be determined and cannot represent other parties not similarly situated. Two of the plaintiffs are to be excluded
25 from the project and their entries are to be cancelled and their lands restored to the public domain. There will be a number of settlers similarly situated. Eight of the plaintiffs belong to a class of settlers whose interests are to be included in the project and who are to receive patents for their lands. There will be a

number of settlers similarly situated but these two classes are in conflict. The settlers in one class are not similarly situated with settlers in the other class, and one cannot represent the other. Their interests are not common but in opposition.

We are of the further opinion that this controversy cannot be solved upon the issues contained in the pleadings. A determination of the contractual rights between the parties is not sufficient. It does not determine the important and controlling fundamental questions of statutory law, involved in the case. A stipulation just filed by the parties to this appeal sets forth that a patent has now been issued and delivered by the United States to the state of Idaho for approximately thirty-five thousand acres of land in this project. This action on the part of the federal government establishes the fact that the Secretary of the Interior has determined in effect that an ample supply of water has been provided for the irrigation of 35,000 acres of irrigable land within the project. We must accept that finding as conclusive. The identification of such lands by Sectional division cannot be made now by the court in this case. It has probably been made by the Seecretary of the Interior in the patent just issued. It may be that upon this patent the rights of the parties may be sufficiently classified and fixed that the court properly invoked may be able to enter the controversy and determine the questions at issue between the parties so classified.

26 "If other parties possess equities superior to those of the patentee upon which the patent is issued a court of equity will upon proper proceedings enforce such equities by compelling a transfer of the legal title or enjoining its enforcement or cancelling the patent."

Gibson vs. Couteau 13 Wall. 92-102.

We are also of the opinion that the charge relating to the construction of the canal around or through the check basin is not within the pleadings of the case and that all the parties interested in that charge are not before the court.

The 46,067.5 acres upon which the charge for maintaining the system for the year 1919 has been increased 50 cents per acre to meet this additional expense introduces another area into the controversy calling for another classification of the settlers as parties to the action. The area of the system having been reduced to a net of 35,000 acres by the Land Department, there will be settlers claiming several thousand acres whose claims are excluded from the system and who as settlers have no further interest in the question whether the charge should be treated as construction or maintenance. It must be plain from this statement alone that we are dealing with a controversy that can only be determined judicially when it is definitely known for what particular lands the patent has been issued to the state.

At present we do not see how the questions at issue can be determined upon the law and between the present parties to this action, without further proceedings. We accordingly direct that an order

be entered that the decree of the District Court be reversed save and except as to the injunctional provisions thereof and that the cause be remanded to that court with instructions to direct that
27 new pleadings be framed according to the suggestions of the foregoing opinion and that all parties necessary to a final determination of the subject matter of the suit as it affects the rights of the parties hereto and all other parties interested therein be brought into the suit and aligned therein according to their respective interests, and for such further proceedings as may be necessary and appropriate for the final disposition of the matters in litigation.

It is so ordered.

Endorsed: Opinion. Filed Mar. 9, 1921. F. D. Monckton, Clerk, By Paul P. O'Brien, Deputy Clerk.

28 Appeal from the District Court of the United States for the District of Idaho, Southern Division.

Decree.

This Cause came on to be heard on the Transcript of the Record from the District Court of the United States for the District of Idaho, Southern Division and was duly submitted:

On Consideration Whereof, It is now here ordered, adjudged, and decreed by this Court, that the decree of the said District Court in this cause be, and hereby is reversed, with costs in favor of the appellants and against the appellees save and except as to the injunctional provisions of said decree of said District Court and that this cause be and hereby is remanded to said District Court with directions that new pleadings be framed according to the suggestions contained in the opinion of this Court in the above entitled cause, and that all parties necessary to a final determination of the subject matter of the suit as it affects the rights of the parties hereto and all other parties interested therein be brought into the suit and alligned therein according to their respective interests, and for such further proceedings as may be necessary and appropriate for the final disposition of the matters in litigation.

It is further ordered, adjudged and decreed by this Court, that the appellants recover against the appellees for their costs herein expended, and have execution therefor.

[Endorsed:] No. 3502. United States Circuit Court of Appeals for the Ninth Circuit. Twin Falls Salmon River Land and Water Company, et al., vs. A. E. Caldwell, et al. Decree. Filed and entered March 9, 1921. F. D. Monckton, Clerk, by Paul P. O'Brien, Deputy Clerk.

29 At a stated term, to wit, the October term, A. D. 1920, of the United States Circuit Court of Appeals for the Ninth Circuit, held in the courtroom thereof, in the city and county of San Francisco, in the State of California, on Monday, the ninth day of May, in the year of our Lord one thousand nine hundred and twenty-one.

Present:

The Honorable William B. Gilbert, Senior Circuit Judge, Presiding,
The Honorable Erskine M. Ross, Circuit Judge,
The Honorable William H. Hunt, Circuit Judge.

No. 3502.

TWIN FALLS SALMON RIVER LAND AND WATER COMPANY, a Corporation; Salmon River Canal Company, Limited, a Corporation; Commonwealth Trust Company of Pittsburg, Trustee, and A. C. Robinson, Appellants,

vs.

A. E. CALDWELL, W. F. MIKESELL, V. E. MORGAN, J. E. POHLMAN, W. C. Pond, James W. Beauchamp, Carl Washburn, and Harold M. Sims, in Their Own Behalf and in Behalf of All Persons Similarly Situated with Them, Appellees.

Order Directing Filing of Opinion upon Petition for Rehearing, etc.

By direction of the Honorable William B. Gilbert, William W. Morrow, and William H. Hunt, Circuit Judges, before whom the cause was heard, ordered that the typewritten opinion this day rendered by this Court in the above entitled cause upon petition for rehearing be filed by the Clerk and that an order be recorded in the Minutes accordingly.

30 On Petition for Rehearing.

No. 3502.

Before Gilbert, Morrow, and Hunt, Circuit Judges.

MORROW, *Circuit Judge:*

In the opinion of this court in this case filed March 9th, 1921, we held with respect to the "check basin" controversy that the question involved was not placed in issue by any pleading but came into the case as evidence upon the general issue. Such was in fact the record, but in a petition for a rehearing upon this question counsel for appellants under a general stipulation between counsel for supplying additional records have filed a copy of a petition in the lower court, filed in that court on March 25, 1919, praying for an injunc-

tion restraining the appellants from further prosecuting an action in the State Court against the appellants for a writ of mandate and from prosecuting any suit or action against the appellants in
31 the State Court involving the determination or adjudication of the question or questions involved in this suit in the United States District Court.

It appears from this petition that the cost of the construction of the "check basin" was involved in that proceeding. The petition alleges:

"The question as to whether or not the work now being done on what is known as the "Check Basin" is original construction work which should be done at the cost and expense of the Twin Falls Salmon River Land & Water Company or maintenance work to be done and performed at the expense of said Salmon River Canal Company, Limited, and as to whether said irrigation system has been completed substantially according to the terms of the said State contract, or whether the said Twin Falls Salmon River Land & Water Company is required to make other additional improvements thereon; * * * all of which matters are in issue in this cause now pending in this court as aforesaid."

Upon this petition the District Court awarded an injunction against the appellees' proceeding in the State Court for the determination of the "check basin" controversy, and later entered a decree finding and adjudging that the expense of construction the "check basin" was chargeable to construction rather than to maintenance. It therefore appears that the controversy concerning the "check basin" was definitely brought into this case by the injunction proceedings and as that injunction was involved in the appeal, it is now properly before the Court. In our opinion we also held that the State Board of Land Commissioners appeared to still have the charge for the construction of the "check basin" under advisement, but neither the Board nor any of its members were parties to this action. They were originally made defendants but have since
32 been dismissed from the case by the appellants.

It is a question whether the State Board, in connection with the State Engineer, has anything more than supervisory power as to construction work under the statute.

We also held that the 46,067.5 acres, upon which the charge for maintaining the system for the year 1909 had been increased 50¢ per acre to meet the additional expenses for alteration of the canal system through the "check basin" introduced another area in the controversy calling for another classification of settlers as parties to the action. But the dominating fact is that this 50¢ per acre is an assessment that has been paid by the parties possessing certain locations within the general area.

The allegation in the petition for an injunction, taken in conjunction with the pleadings and evidence in the case, and the decree entered therein, appear to bring the question of the assessment be-

fore us for the area upon which the assessment appears to have been levied.

The appellants contend that the decree of the lower court is in error in finding and adjudging that the cost of the check basin is a construction charge.

The opinion of the District Court upon this question is as follows:

"The question is, against whom shall be charged about $20,000.00 expended during the current year in altering what is known as the check basin,—the construction company or the settlers. This unit, so called, is a natural basin of about ninety acre in area, situate a short distance below the dam, and was utilized by the promoting company as a part of its canal. Naturally the seepage and evap-
33 oration from such a unit would be greater than from an ordinary canal channel; but of more importance is the fact that as soon as it began to be used holes developed in the bottom of the basin, through which the water poured into the underlying broken lava formation. A still further loss was suffered from the fact that the basin is lower than the bottom of its outlet, and hence, when the water is shut off at intervals, as is the practice during the irrigating season, that part which cannot be discharged is lost through percolation and evaporation, and when the water is again turned in it is necessary first to fill up this reservoir with a new supply, which in turn is wasted when the source is shut off. In practice there has been inspection of the bottom of the basin from time to time when the water is off, for the purpose of discovering newly developed holes, and such as have been found have been successfully filled up, with the exception that in the earlier years one opening developed of such magnitude that it was found necessary to encircle it with a dike, and thus prevent the water from reaching it. It is also to be added that by reason of the fact that the throat of the outlet was not properly constructed—it was too narow and too high—it became necessary to hold the water in the basin at a level considerably above that which would otherwise have been necessary, thus adding to the peril and loss arising from the defective basin.

In his letter of October 18, 1917, to the State Land Board the Commissioner of the General Land Office directed attention
34 to the waste in this part of the system and suggested that if the canal were built through or around the basin there would be a marked saving in water, and intimated that as a condition to the patenting of 35,000 acres if would be necessary for the construction company or the committee of bondholders to eliminate this feature. Accordingly, the following season the defendant Salmon River Canal Company, which is under the control of the promoting company and the bondholders, commenced the construction of a canal through the basin, paying the expense out of the funds collected from the settlers for maintenance purposes. In the winter and spring of 1919 the work was resumed, and the annual maintenance charge per acre for the year 1919 was increased by fifty cents an acre to cover the expense, which was estimated to be between twenty and twenty-five thousand dollars. The State Board, to which the

Canal Company must submit its budget, tentatively permitted it to make the collection, upon the condition that the settlers have credit for the amount thereon on the purchase price, if upon final consideration it should be held to be a construction, rather than a maintenance, charge. During the hearing here upon the merits both parties applied for restraining orders, the plaintiffs to prevent the collection of the charge, and the defendants to prevent the plaintiffs from pressing an application pending in the state court to require defendants to furnish water to those who refused to pay, and upon consideration an order was made in effect substantially the same as that of the State Board, and the question is now submitted whether
35 or not the expense in question can properly be recovered from the settlers as a maintenance charge.

While there is testimony to the effect that the basin has a measure of utility in operating the system, I cannot escape the conclusion that economy of construction rather than considerations of utility furnished the controlling reason for the use of the basin, instead of constructing a canal through or around it. That the system can be operated without it is conclusively shown, and so much is admitted by the defendants in their act of eliminating it. Furthermore, I have no doubt that the underlying motive for its present abandonment and the construction of canal through it is the desire to comply with the suggestion of the Commissioner of the General Land Office, and thus procure for the defendants, the Land and Water Company and the mortgage trustees, the very substantial benefit arising from the increased acreage against which they will be able to collect construction costs. True, their motive is not necessarily the decisive issue, but it has an important bearing upon such issue. It must be borne in mind that they and not the settlers are, and always have been, in control of the Canal Company, by which ostensibly the work is being done. No emergency had arise-, and there had been no substantial change of conditions for several years. It may be admitted that it would have been better construction not to have utilized the basin—that was obvious from the beginning. But when the work in controversy was undertaken, the peril had not increased; upon the other hand, it did not appear to be so imminent, for
36 during several years and until there was an opportunity for profit the defendants were content to operate through the basin, and each year's successful operation gave additional ground for the belief that there would be no serious casualty. By their proposed action they would now put the entire burden of making the alteration upon the settlers and take for themselves the benefit. In defense of their position that it is not a construction charge, the defendants rely upon the fact that the basin is delineated upon a general map of the system, made after the original contract with the State, and the further fact that in certain of the reports of the State Engineer and his assistant it is referred to as a part of the system. But these facts are inconclusive. It is not pretended that the State Board ever accepted, or, with knowledge of the conditions, approved of the basin as a part of the system. The maps also show rights of way for canals, and ditches, but it would hardly be contended

that if, in constructing a canal along such right of way an open chasm were encountered the State Board would be bound to accept the canal though it would carry no water but simply pour it into such chasm.

It has been repeatedly contended by the parties and held by the courts that in such undertakings all parties contract with reference to the law, and into their agreements must be read pertinent provisions of the statutes. Here doubtless all parties interested understood that the system contracted for was to measure up to the standard imposed by the statutes. The State was not contracting with the promoting company for part of an adequate system, but for a completed adequate system. No other construction work was contemplated. When the Land and Water Company got through
37 there was to be nothing more to do—there was to be a system up to the requirements of the law. But under the federal statutes the water must be furnished in a "substantial ditch or channel." If, in 1918 and 1919, this basin was a substantial water conduit, then the defendants were wholly unwarranted in seeking, for their profit, to change it at the expense of the settlers. If it was not a substantial water conduit, then it never was built to comply with the law, for admittedly it had been improved, and was in a safer and more efficient condition in 1918 and 1919 than in 1911, when it was first put into use. The construction contract authorizes the use of "natural channels or coulees," but only when "suitable." It is to be borne in mind that we are not here concerned with the question merely whether it would be good engineering and good sense to permit water to spread over an area of ninety acres, and thus be subject to excessive evaporation and percolation. If that were the only question, possibly the State and settlers would be bound, but the defendants cannot take that position, for if that were all, as already suggested, there would be no occasion for their precipitous action at this time, and there would be no possible excuse for imposing such an expense upon the settlers against their will. They must necessarily take the position that the system is in peril, and that if it is to function normally this work must be done. The check basin being in as safe and efficient a condition now, as it was when it was first used, it necessarily follows from the defendants' own contentions that the basin never was either a "substantial" conduit,
38 as required by law, or a "suitable" natural channel, as expressly required by the contract, and accordingly it must be held that its incorporation into, did not operate to complete, the system, and that the expense of the present work is chargeable to construction rather than to maintenance.

We concur in this opinion and therefore affirm the decree with respect to the check basin. Our former opinion will be amended in this particular.

Endorsed: Opinion Filed May 9 1921. F. D. Monckton, Clerk, by Paul P. O'Brien, Deputy Clerk.

39 (Title of Court and Cause.)

Decree.

Appeal from the District Court of the United States for the District of Idaho, Southern Division.

This Cause came on to be heard on the Transcript of the Record from the District Court of the United States for the District of Idaho, Southern Division and was duly submitted:

On Consideration Whereof, It is now here ordered, adjudged, and decreed by this Court, that the decree of the said District Court filed September 13, 1919, in this cause be, and hereby is affirmed, with costs in favor of the appellants and against the appellees.

It is further ordered, adjudged and decreed by this Court, that the appellants recover against the appellees for their costs herein expended, and have execution therefor.

[Endorsed:] No. 3502. United States Circuit Court of Appeals for the Ninth Circuit. Twin Falls Salmon River Land and Water Company, et al., vs. A. E. Caldwell, et al. Decree. Filed and entered May 9, 1921. F. D. Monckton, Clerk, by Paul P. O'Brien, Deputy Clerk.

40 At a stated term, to wit, the October term, A. D. 1920, of the United States Circuit Court of Appeals for the Ninth Circuit, held in the court room thereof, in the city and county of San Francisco, in the State of California, on Monday, the first day of August, in the year of our Lord one thousand nine hundred and twenty-one.

Present:

The Honorable William W. Morrow, Circuit Judge, Presiding.
The Honorable William H. Hunt, Circuit Judge.

TWIN FALLS SALMON RIVER LAND & WATER COMPANY, a Corporation, et al., Appellants,

vs.

A. E. CALDWELL et al., Appellees.

No. 3502.

Order Denying Petition for Rehearing.

On consideration thereof, and by direction of the Honorable William B. Gilbert, William W. Morrow, and William H. Hunt, Circuit Judges, before whom the cause was heard, it is ordered that the Petition, filed June 8, 1921, on behalf of the appellants for a rehearing of the above-entitled cause be, and hereby is denied.

41 No. 3502.

Petition for Appeal to the Supreme Court of the United States.

The above named appellants, Twin Falls Salmon River Land and Water Company, Commonwealth Trust Company of Pittsburgh, Trustee, and A. C. Robinson, respectfully show that the above entitled cause is now pending in the United States Circuit Court of Appeals for the Ninth Circuit, and that a judgment was therein rendered on the 9th day of March, 1921, reversing the decree of the District Court of the United States for the District of Idaho, Southern Division, against these appellants, and that thereafter and on the 9th day of May, 1921, said decision and judgment of the
42 Circuit Court of Appeals was by said Court modified, and by the judgment or decree so entered on the 9th day of May, 1921, said Circuit Court of Appeals affirmed a judgment for over Twenty-three Thousand ($23,000) Dollars entered against these appellants, and especially against the said Twin Falls Salmon River Land and Water Company, on the 4th day of February, 1920, by the said District Court of the United States for the District of Idaho, Southern Division, and thereupon these appellants, within the time fixed by order of the Court, filed their petition for rehearing on the 8th day of June, 1921, in said cause with the Clerk of said Circuit Court of Appeals, which petition was in due form, but was thereafter and on the 1st day of August, 1921, denied and overruled by said Circuit Court of Appeals; that the matter in controversy in said suit exceeds One Thousand ($1,000) Dollars besides costs; that this cause is one in which the judgment or decree of the Circuit Court of Appeals for the Ninth Circuit is not final and that it is a proper cause to be reviewed by the Supreme Court of the United States on appeal.

And these appellants conceiving themselves aggrieved by the decree and judgment herein, so made and entered in this Court on the 9th day of March, 1921, and modified on the 9th day of May, 1921, do hereby appeal from said judgment and decree to the Supreme Court of the United States, and they pray that this appeal may be allowed and that a transcript of the record and proceedings in said cause, with all things concerning the same, duly authenticated, may be sent to the Supreme Court of the United States, in order that the errors complained of in the assignment of errors herewith
43 filed, may be reviewed, and, if error be found, corrected according to the laws and customs of the United States.

(Sgd.) RICHARDS & HAGA,
Attorneys for Appellant.

Residence: Boise, Idaho.

[Endorsed:] Petition for Appeal to Supreme Court U. S. Filed October 15, 1921. F. D. Monckton, Clerk.

44 No. 3502.

Assignment of Errors.

The above named appellants, Twin Falls Salmon River Land and Water Company, a Corporation, Commonwealth Trust Company of Pittsburgh, Trustee, and A. C. Robinson, in connection with their petition for appeal herein to the Supreme Court of the United States from the decision and decree of the above entitled Court as amended and modified on the 9th day of May, 1921, and the order of said Court overruling and denying appellants' petition for rehearing on the first day of August, 1921, present and file their Assignment of Errors and say that said decree as amended is erroneous and unjust to these appellants, and particularly in this:

45 1. That the Court erred in holding and deciding that under a general bill filed in May, 1914, for the adjudication of the rights of appellees and other settlers similarly situated on what is known as the Salmon River Project, constructed under Section 4 of the Act of Congress approved August 18, 1894, entitled "An Act making appropriations for sundry civil expenses of the Government for the fiscal year ending June 30, 1895, and for other purposes" (28 Stat., 372-422), and the amendment thereto approved June 11, 1896 (29 Stat., 413-434), commonly known as the Carey Act, and the acts amendatory thereof and the laws of the State of Idaho accepting the terms and provisions of said acts and enacted for the purpose of carrying out the purposes and provisions thereof, and for construing the contract between the appellant Twin Falls Salmon River Land and Water Company and the State of Idaho, for the construction of certain irrigation works, and the contracts between said Company and settlers on said Carey Act lands for the purchase of shares or interest in said irrigation system, a judgment for upwards of Twenty-three Thousand ($23,000.00) Dollars could be entered against said Twin Falls Salmon River Land and Water Company, without any amended or supplemental bill being filed, bases upon transactions and acts occurring approximately five years after the filing of said bill, to wit, based upon what was claimed to be excessive collections from the settlers by the Salmon River Canal Company for maintenance charges, it being contended that such excessive charges were due to maintenance and repair made by said Salmon River Canal Company in 1919, which should have been made by said Twin Falls Salmon River Land and Water Company under its contract with the State of Idaho.

46 2. That the Court erred in not holding and deciding that the State Board of Land Commissioners and its successor, the Commissioner of Reclamation, had exclusive jurisdiction to determine whether said irrigation system had been constructed by said Twin Falls Salmon River Land and Water Company in compliance with its contract with the State of Idaho and the requirements of

the said Acts of Congress, and whether said Company was subject to any further duties or obligations under said Acts and contract.

3. That the Court erred in affirming the judgment of the Trial Court for Twenty-three Thousand Thirty-three Dollars and 75/100 ($23,033.75) based upon the collections made in 1919 by the Salmon River Canal Company for maintenance charges, after such charges had been approved and held proper by the State Board of Land Commissioners of the State of Idaho, without any pleadings putting such charges in issue, but basing such judgment upon a bill filed in May, 1914, which made no reference whatever to said charges.

4. That the Court erred in holding and deciding that any valid judgment or decree could be entered against appellants in this cause in view of the defect of parties.

5. That the Court erred in holding and deciding that the work performed by the Salmon River Canal Company in 1919 and paid for from maintenance charges collected by said Company and approved by the State Board of Land Commissioners, as provided by the laws of the State of Idaho, was original construction work which the Twin Falls Salmon River Land and Water Company, and those claiming under it, should have done or performed under the
47 contract between said Company and the State of Idaho for the construction of said irrigation system, and in holding and deciding that the Court had jurisdiction to pass on such matters while said issue was pending before the State Board of Land Commissioners for said State, which is the tribunal created by law for administering and carrying out the terms of said Acts of Congress and the laws of the State of Idaho supplemental thereto, in so far as the same are to be carried out and administered by the State of Idaho or private parties or agencies other than the Secretary of the Interior.

6. That the Court erred in holding and deciding that the work performed by said Salmon River Canal Company as hereinbefore referred to, should have been performed by said Twin Falls Salmon River Land and Water Company, and in holding and deciding that said work was an issue in the case.

7. That the Court erred in holding and deciding that said Twin Falls Salmon River Land and Water Company should repay to the settlers fifty cents per acre on account of moneys paid by them as maintenance charges to the Salmon River Canal Company, when such settlers were indebted in sums aggregating from forty to sixty dollars per acre to said Twin Falls Salmon River Land and Water Company, and were, and had been, in default for many years in the payment of both principal and interest to said Company.

8. That the Court erred in not holding and deciding that if any sum whatever was due from said Twin Falls Salmon River Land and Water Company to settlers under its irrigation system, such sum should be credited upon the payments in default and due and owing from said settlers to said Company.

48 9. That the decision of the Trial Court and the supplement or amended decision of the Circuit Court of Appeals in this cause are contrary to law and rest upon assumed facts which are not in issue under the pleadings and which were not established under the evidence.

10. That the Court erred in not holding and deciding that the bill of complaint in this cause did not state a cause of action against appellants, and in not directing that the suit should be dismissed for want of equity and for defect of parties.

11. That the Court erred in not holding and deciding that if any work performed in 1919 by the Salmon River Canal Company was work which said Twin Falls Salmon River Land and Water Company should have performed, that any judgment on account thereof should have been in favor of said Salmon River Canal Company and not in favor of the individual settlers who had paid therefor in the form of maintenance to said Salmon River Canal Company, and if judgment had been so entered it could have been credited upon the amount due from said Salmon River Canal Company to said Twin Falls Salmon River Land and Water Company.

12. That the Court erred in not holding and deciding that the approval of the water supply for a Carey Act project made by the Secretary of the Interior when the segregation is made, is final, conclusive and binding on all parties, and is not open to readjudication after the works have been completed and the lands entered pursuant to law by actual settlers, and in not holding that patent should issue for the lands actually entered by bona fide settlers and that such settlers should be entitled to their proportionate share of all the water available and no more.

49 13. That the Court erred in not holding and deciding that all contracts for the sale of water rights entered into by the Twin Falls Salmon River Land and Water Company, after its available water supply had been exhausted, were unauthorized and void, and that persons claiming thereunder could not share equally with prior purchasers in the available water supply.

Wherefore, Appellants pray that the decree and judgment of the Circuit Court of Appeals and of the Trial Court entering judgment against said Twin Falls Salmon River Land and Water Company for Twenty-three Thousand Thirty-three Dollars and 75/100 ($23,033.75) be reversed and set aside and the cause remanded with directions to dismiss the amended bill of complaint in this cause.

(Sgd.) RICHARDS & HAGA,
Attorneys for Appellants.

Residence: Boise, Idaho.

[Endorsed:] Assignment of errors on appeal to Supreme Court U. S. Filed October 15, 1921. F. D. Monckton, Clerk.

* * * * * * *

50 No. 3502.

Order Allowing Appeal.

It is hereby ordered, That the appeal in the above entitled case to the Supreme Court of the United States be and is hereby allowed as prayed.

Dated this 15th day of October, 1921.

(Sgd.) WM. B. GILBERT,
United States Circuit Judge, Ninth Circuit.

[Endorsed:] Order allowing appeal to Supreme Court U. S. Filed October 15, 1921. F. D. Monckton, Clerk.

* * * * * * *

51 No. 3502.

Bond on Appeal to the Supreme Court of the United States.

Know all men by these presents, That we, Twin Falls Salmon River Land and Water Company, Commonwealth Trust Company of Pittsburgh, Trustee, and A. C. Robinson, as principals, and American Surety Company of New York, as surety, are held and firmly bound unto A. E. Caldwell, W. F. Mikesell, V. E. Morgan J. E. Pohlman, W. C. Pond, James W. Beauchamp, Carl Washburn and Harold M. Sims, in their own behalf and in behalf of all persons similarly situated with them, and Salmon River Canal
52 Company, a corporation, appellees above named, in the sum of Five Hundred ($500.00) Dollars for the *ap*yment of which well and truly to be made to the said appellees in the above entitled cause, we bind ourselves and each of our successors and assigns, jointly and severally, firmly by these presents.

Sealed with our seals and dated this 11th day of October, 1921.

The condition of this obligation is such that—

Whereas, the above named Twin Falls Salmon River Land and Water Company, a Corporation. Commonwealth Trust Company of Pittsburgh, Trustee, and A. C. Robinson, have prosecuted an appeal to the Supreme Court of the United States to reverse the judgment and decree of the United States Circuit Court of Appeals for the Ninth Circuit, made and entered in the above entitled cause, affirming a certain judgment made and entered by the District Court of the United States for the District of Idaho, Southern Division, in said cause;

Now, therefore, If the said appellants shall prosecute their said appeal to effect and shall answer all costs if they fail to make their said plea good, then this obligation shall be void, otherwise to remain in full force and effect.

In witness whereof, The said parties have caused their names to be hereunto subscribed, and the said surety has hereunto affixed its corporate seal the day and year first above written.

TWIN FALLS SALMON RIVER LAND AND WATER COMPANY,
(Sgd.) By RICHARDS AND HAGA,
Its Attorneys.

53 COMMONWEALTH TRUST COMPANY OF PITTSBURGH,
Trustee,
(Sgd.) By RICHARDS & HAGA,
Its Attorneys.

A. C. ROBINSON,
(Sgd.) By RICHARDS & HAGA,
His Attorneys.

AMERICAN SURETY COMPANY OF NEW YORK,
(Sgd.) By BRADLEY SHEPPARD,
Resident Vice-President.

Attest:
[SEAL.] (Sgd.) McKEEN F. MORROW,
Resident Assistant Secretary.

The foregoing bond approved as to form and sufficiency this 15th day of October, 1921.
(Sgd.) WM. B. GILBERT,
United States Circuit Judge.

54 *Authority of Signers for Surety.*

Extract from the Record Book of the Board of Trustees of the American Surety Company of New York.

The first meeting of the Board of Trustees of the American Surety Company of New York, after the annual Stockholders' meeting, was held at the office of the Company, No. 100 Broadway, New York City, on Tuesday, January 18, 1921, at twelve o'clock noon.

"The Secretary read the report of the Nominating Committee as follows:

"To the Board of Trustees,
American Surety Company of New York.

"GENTLEMEN:

"The Committee appointed by the Executive Committee of this Company, at their meeting held Tuesday, November 30, 1920, for the purpose of nominating * * * Officers of the Company,

* * * for the ensuing year and until their successors are elected. beg leave to report as follows:

"We nominate for

* * * * * * *

Place.	Resident vice-presidents.	Resident assistant secretaries.
Boise City, Idaho.	Bradley Sheppard. F. F. Johnson. Crawford Moore. Leo. J. Falk. Harry N. Falk.	J. H. Richards. O. O. Haga. Chas. Kahn. McKeen Morrow.

* * * * * * *

"Whereupon, It was

"Resolved, That the Secretary be authorized to cast one ballot on behalf of the Trustees present, for the members of the Executive Committee, Finance Committee, Committee on Accounts, Committee on Capital Box, Officers and Counsel, as recommended by the Nominating Committee for the ensuing year and until their successors are elected; which was done, and thereupon the aforementioned persons were declared to have been unanimously elected to their respective offices for the ensuing year and until their successors are elected.

"The following resolution was adopted:

"Resolved, That the Resident Vice Presidents be and they hereby are, and each of them is hereby, authorized and empowered to execute and to deliver and to attach the seal of the Company to any and all obligations for or on behalf of the Company, such obligations, however, to be attested in every instance by a Resident Assistant Secretary."

STATE OF NEW YORK,
County of New York, ss:

I, M. P. Coughlin, Assistant Secretary of the American Surety Company of New York, do hereby certify that I have compared the foregoing extracts and transcripts, from the Record Book of the Board of Trustees of the American Surety Company of New York, with the original record of said Board, and that the same are correct extracts and transcripts therefrom as they appear of record and are set forth and contained in said Record Book; and I further certify that I have compared the foregoing resolutions with the originals thereof, as recorded in the Minute Book of said Company, and do certify that the same is a correct and true transcript therefrom, and of the whole of said original resolutions; and that the said resolutions have not been revoked or rescinded.

55 Given under my hand and the seal of the Company, at the City of New York, this 19th day of January, 1921.

[SEAL.] (Sgd.) M. P. COUGHLIN,
Assistant Secretary.

[Endorsed:] Bond on appeal to the Supreme Court U. S. Filed October 15, 1921, F. D. Monckton, Clerk.

* * * * * * *

56 No. 3502.

Certificate of Clerk U. S. Circuit Court of Appeals to Transcript of Record upon Appeal to the Supreme Court of the United States.

I, Frank D. Monckton, as Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, do hereby certify the foregoing Three Hundred and Ten (310) pages, numbered from and including 1 to and including 310, and comprised in the Transcript of Record filed May 28, 1920, and I do hereby certify that the foregoing Four Hundred and Eight (408) pages, numbered from and including 1 to and including 408, marked Volume I, and I do hereby certify the foregoing One Hundred and Sixty-four (164) pages, marked Volume II, filed October 11, 1920, and the foregoing Fifty-five (55) typewritten pages numbered from and including 1 to and including 55, consisting of the proceedings had in this Court in the above entitled cause, to be a full, true and correct copy of the entire record under Rule 8 of the Supreme Court of the United States in the above entitled cause, including the Assignment of Errors on Appeal to the Supreme Court of the United States and of all proceedings had, and of all papers, including the Opinions filed in the said Circuit Court of Appeals in the above-entitled case, made pursuant to request of counsel for the appellants, as the originals thereof remain on file and appear of record in my office and that the same constitutes the transcript of record upon appeal to the Supreme Court of the United States in the above entitled cause.

Attest my hand and the seal of the United States Circuit Court of Appeals for the Ninth Circuit, at the City of San Francisco, in the State of California, this 5th day of November, A. D. 1921,

[Seal United States Circuit Court of Appeals, Ninth Circuit.]

F. D. MONCKTON,
Clerk,
By PAUL P. O'BRIEN,
Deputy Clerk.

* * * * * * *

57 *Citation on Appeal to the Supreme Court of the United States.*

To A. E. Caldwell, W. F. Mikesell, V. E. Morgan, J. E. Pohlman, W. C. Pond, James W. Beauchamp, Carl Washburn and Harold M. Sims, in their own behalf and in behalf of all persons similarly situated with them, and Salmon River Canal Company, a Corporation, Greeting:

You are hereby cited and admonished to be and appear in the Supreme Court of the United States in the City of Washington, District of Columbia, within sixty days from the date of this writ, pursuant to an appeal, duly allowed by the Circuit Court of Appeals for the Ninth Circuit, wherein Twin Falls Salmon River Land and Water Company, a corporation, Commonwealth Trust Company of Pittsburgh, a corporation, Trustee, and A. C. Robinson are appellants and you are appellees, to show cause, if any there be,
58 & 59 why the decree, order and judgment rendered against the said appellants, as in said appeal mentioned, should not be corrected, and why speedy justice should not be done the parties in that behalf.

Witness the Honorable, William B. Gilbert, United States Circuit Judge for the Ninth Circuit, this 15th day of October, A. D. 1921.

WM. B. GILBERT,
United States Circuit Judge, Ninth Circuit.

Service of the foregoing citation and receipt of a copy thereof admitted this 19th day of October, 1921.

JAMES R. BOTHWELL,
Attorney for Individual Appellees.
G. M. HALL,
President Salmon River Canal Company.

60 [Endorsed:] Docketed. 16. No. 3502. United States Circuit Court of Appeals for the Ninth Circuit. Filed Oct. 25, 1921. F. D. Monckton, Clerk. Richards & Haga, Boise, Idaho.

61 In the Supreme Court of the United States, October Term, 1921.

No. 637.

TWIN FALLS SALMON RIVER LAND AND WATER COMPANY, a Corporation; Commonwealth Trust Company of Pittsburgh, Trustee, and A. C. Robinson, Appellants,

vs.

A. E. CALDWELL et al., Appellees.

Præcipe Designating Parts of Record Which Appellants Deem Necessary for the Consideration of said Cause on Appeal.

To the Clerk:

Please be advised that appellants, relying upon the Assignment of Errors heretofore filed in said cause, in connection with their petition for appeal, do not deem it necessary for the consideration of said appeal that the printed record should include more than the papers and parts of the record designated below, and you will, therefore, please include in such printed transcript of record the
62 following, and no other, papers or exhibits, to-wit:

(1) Amended Bill of Complaint (pages 7 to 41, inclusive of Vol. I printed transcript); Exhibit "A" to Amended Complaint (pages 42 to 61, inclusive of Vol. I, printed transcript), omitting signatures of parties.

(2) Amended Answer of Twin Falls Salmon River Land and Water Company, commencing on page 74 and ending on page 99, Vol. I of printed transcript.

(3) Omit Answer of Salmon River Canal Company (pages 99 to 105).

(4) Answer of Commonwealth Trust Company of Pittsburgh, Trustee, commencing on page 105 and ending on page 123 of printed transcript.

(5) In lieu of the Answer of A. C. Robinson insert the following:

"Answer of A. C. Robinson.

(Synopsis of: Reduced according to Præcipe of Appellants.)

Answer adopts the answer of Commonwealth Trust Company of Pittsburgh and prays that the same may be taken and considered as part of this defendant's answer.

Alleges that this answering defendant holds under assignment to him settlers' contracts aggregating about $194,397.48, and that

such assignments have been duly recorded and were made for a valuable consideration as security for loans and moneys advanced by said defendant to Twin Falls Salmon River Land and Water Company, and that such loans were made without notice or knowledge of any setoffs, defenses or counterclaims on the part of the makers of such contracts."

(6) In lieu of the Statement of the Evidence contained in Vol. I insert the following:

"The Statement of the Evidence under Equity Rule 75.

(Synopsis of: Reduced according to Præcipe of Appellants.)

63 The first trial commenced before the Court on April 1st, 1915. Testimony was introduced by plaintiffs showing the acreage embraced in the settlers' contracts and entitled to water; the acreage that had been irrigated in 1911 to 1914, inclusive; the amount of water that had been delivered by the Company during said years for irrigation purposes; the amount of water that had been stored in the reservoir during each of said years; the amount that had been carried over from one year to another; the seepage and evaporation losses from the reservoir; the transmission losses from the system; circulars or advertisements purporting to have been sent out by the Company describing the land and water supply; evidence showing that the settlers had not received ½ inch of water continuous flow during each irrigation season, and that the water supply was inadequate to deliver that amount; the Trust Deed under which the Commonwealth Trust Company of Pittsburgh is now Trustee, and of assignment of water contracts to A. C. Robinson. And after plaintiff rested E. P. Darlington, an engineer of wide experience, testified on behalf of defendants, having previously testified for plaintiffs, as to the size and capacity of the structures, and with reference to the character of construction he said: 'The character of the construction is especially good. The system is well and carefully built, located by careful surveys, built under strict specifications. The structures have always been considered by engineers to be first class in every particular. They are made of concrete and steel, reinforced concrete.'

"During the progress of the trial the defendants offered testimony as to the amount of water required per acre, to which counsel for plaintiffs objected. During the discussion of that subject the following colloquy took place:

'The Court: It is an unusual case and I am very much in doubt whether I can enter a decree by simply construing the contract. That seems to be about all that counsel for plaintiffs have in mind. Can a suit be maintained merely for the purpose of construing a contract, without granting any relief?

'Mr. Golden (of counsel for plaintiff): Adjudicating the right.

'The Court: But adjudicating the right means granting relief. If I construe the contract, that would be the theory upon which the decree would be entered, but what would it require the defendant to do, or to refrain from doing?

'Mr. Golden: It would quiet title in the plaintiffs, to the amount of the water right.

'The Court: I cannot quiet title to a water right in which a large number of persons are interested without having them before the Court.

Mr. Golden: As between the complainant, the vendor and the vendee, the adjudication would hold, without the appearance of any other party to it, because while indirectly it may affect the other parties, yet as between the contracting parties it would settle their differences and rights, if any.

'The Court: What would be the purpose of all this evidence about the amount of water supply then, if it was merely to construe the contract?

64 'Mr. Golden: For the sole purpose of showing to the Court that this company is unable to carry out all of its contracts, and for that reason, and because of its insolvency, that the Court take charge of this contract. That was the purpose, your Honor, and when we eliminate that, if the Court is disinclined to take charge—that was the sole purpose, and no other, because that is one of the principal reliefs asked for after the adjudication of these rights.

'The Court: You don't allege that they are mismanaging the property? The property is being well managed at this time?

'Mr. Golden: It has sold and disposed of water.

'The Court: Yes, but it is not doing so now. If you had asked that it be enjoined from entering into further contracts, that would be clear and definite.

'Mr. Golden: We asked for that relief, your Honor.

'The Court: The defendants seem to be very willing not to sell any more. If that were all we could enter a decree at once, by consent.

'Mr. Longly (of counsel for plaintiffs): We ask in our prayer, among other things, that this contract, the settlers' contracts, and the State contract, be specifically enforced as to the defendants in this action. Now, the proof offered in addition to the contracts amounts, as we believe, to a showing that the defendant company, both the Land & Water Company and the Canal Company, being in the control of the Land & Water Company, have refused to give us the performance to which we are entitled under the terms of our contract. In other words, they have failed to supply us with the water we purchased. And as a consequence we ask that they be compelled to do so. * * * Now, while there is no claim here that the system has not been completed, perhaps, we do claim that the object and result to be attained by the completion of the system has not been brought about or given to us, that is, the furnishing and supplying of the water right, and that was the situation in the Childs-Neitzel case (141 Pac. 77). * * *

'The Court: Isn't there a distinction between these cases, Mr. Longley? Assuming all you claim to be true, both as to the facts and the law—I did not intend to question the power of the Court specifically to enforce a contract of this general character; that wasn't the difficulty in my mind; but in the Childs-Neitzel case, as I understand, the Court simply held that the Court would see that the contract was carried out, by completing the system, but the company here apparently has now done all that it can do. The Court, of course, can't compel the defendant to do an impossible thing.

If the water isn't available, if the water is not there, and that
65 is the deficiency of the system according to your view, not that the dam has been improperly or insufficiently constructed, or that the system is incomplete—that, as I understand, that the work has been done. The water supply, however, is insufficient, as you contend, and that I understand is substantially your only contention. You do not contend that the system is being mismanaged, or that you are being discriminated against. You are simply contending that the company has not a sufficient water supply to meet its contracts. * * *

'Mr. Longley: The Court in this case could compel the defendants to refrain from attempting to enforce these water contracts until they have performed, and furnished the water supply to which we say we are entitled, and we ask in this case that this trust deed, in so far as it may be in excess of the water supply available, be cancelled, and that these defendants be enjoined from enforcing or attempting to enforce, or collecting or attempting to collect, the water payments due, until they give us what we have bought.'"

(7) Omit except as above set forth all of Statement of Evidence under Equity Rule 75 contained in Vol. I commencing on page 125, and other papers, affidavits, orders, etc. contained in said Vol. I between pages 125 to and including page 408, the matter so omitted consisting of: (*a*) Decision of District Court filed June 26, 1915 (published in official reports); (*b*) Notice of appellants for leave to introduce further proof; (*c*) Affidavit of S. H. Hays, Esq. on application for rehearing and for reopening case; (*d*) Memorandum decision of District Court on application to reopen case; (*e*) Interlocutory Decree; (*f*) Assignment of Errors on first appeal to United States Circuit Court of Appeals; (*g*) Petition for said appeal and return to record.

(8) Omit all of Volume II as the same consists of evidence as to the duty of water.

(9) Omit index to Volume III and make new index as required by the rules of the Supreme Court.

(10) Omit title to order on page 9 of Volume III and in lieu thereof insert:

"(Title of Court and Cause.)"

66 (11) Include pages 9 to 66 of Volume III down to the testimony of Ray M. Beauchamp.

(12) Omit testimony of Ray M. Beauchamp commencing on page 66 and ending on page 77, also testimony of T. J. Douglas, commencing on page 77 and ending of page 80, as such testimony of said witness relates to duty of water and matters not connected with questions involved on this appeal.

(13) Include testimony of F. A. Wilkie commencing on page 80 of Vol. III and ending on page 100, including report of State Engineer and the statement above the words "J. E. Pohlman."

(14) Omit testimony of J. E. Pohlman commencing on page 100, of Robert Rayl commencing on page 101, of W. F. Mikesell commencing on page 104, and of R. M. Beauchamp commencing on page 109 and ending on page 111, as said witnesses testified with reference to crops on the project and the amount of water required per acre.

(15) Include the statement with reference to plaintiffs' Exhibit "2" commencing on page 111 to and including plaintiffs' Exhibit "3" ending on the bottom of page 121.

(16) Omit matters set out on pages 122 to 144, both inclusive, as the same relate to methods of irrigation, crops and duty of water.

(17) Insert the preliminary statement of Don H. Bark as to his qualification and experience commencing at the bottom of page 144 and ending with the sentence "In 1909 I was detailed to work in Idaho, and have been here ever since in my present capacity" on page 145, but omit the balance of his testimony ending with the first line on page 182, except his statement near the bottom of page 171, which reads as follows:

67 "I consider the Salmon project the best class of construction, outside of the Oakley. I consider it the best constructed Carey Act project in the State. Taking into consideration the canals, headgates, dam and the whole works, it is certainly the best Carey Act system in the State."

(18) Omit the testimony of the witnesses Carter, McDonald, Furrow, Larsen, Korthuis, Henstock, Harlam, Van Till, Pierce, Craig, Palmer, Perreboom, Caudle, Hartley, Galley, Callen, Pratt, Larsen, Starr, Dodd, Beck and Griffiths, commencing on page 182 and ending on page 200. Insert the balance of page 200, commencing with the words "Whereupon plaintiffs rested their case" to and including the words "Dated this 12th day of March, 1918," on page 242.

(19) Omit the balance of page 242 to the decision of Judge Dietrich commencing near the top of page 252.

(20) Insert the decision commencing near the top of page 252, and other decisions, decrees and order down to the petition for

appeal on page 287, omitting, however, the names of the attorneys on page 274.

(21) Omit all papers, orders and certificates relating to the appeal from the U. S. District Court for the District of Idaho to the U. S. Circuit Court of Appeals for the Ninth Circuit, commencing near the bottom of page 287 and ending at the bottom of page 310.

(22) Insert the proceedings had in the U. S. Circuit Court of Appeals for the Ninth Circuit in this cause and all papers relative to the appeal of said cause from said Court to the United States Supreme Court as certified to you by the Clerk of the Circuit Court of Appeals, omitting, however, the title of the case in each
68 & 69 paper and inserting in lieu thereof the following:

"(Title of Court and Cause.)"

Dated this 7th day of December, 1921.

RICHARDS & HAGA,
Solicitors for Appellants.

Residence: Boise, Idaho.

Service of foregoing Præcipe and receipt of copy thereof admitted this 9th day of December, 1921.

JAMES R. BOTHWELL,
Solicitor for Appellees.

Residence: Twin Falls, Idaho.

70 & 71 [Endorsed:] 217—28592. In the Supreme Court of the United States. October Term, 1922. No. —. Twin Falls Salmon River L. & W. Co. a corporation, et al., Appellants, vs. A. E. Caldwell, et al., Appellees. Præcipe designating parts of record which appellants deem necessary for the consideration of said cause on appeal. Richards & Haga, Boise, Idaho.

72 [Endorsed:] File No. 28592. Supreme Court U. S., October Term, 1922. Term No. 217. Twin Falls Salmon River L. & W. Co., et al., Appellants, vs. A. E. Caldwell et al. Designation by appellants of parts of the record to be printed, and proof of service of same. Filed December 27, 1921.

Endorsed on cover: File No. 28592. U. S. Circuit Court Appeals, 9th Circuit. Term No. 217. Twin Falls Salmon River Land and Water Company, Commonwealth Trust Company of Pittsburgh, trustee, &c., et al., appellants, vs. A. E. Caldwell, W. F. Mikesell, V. E. Morgan, et al., &c. Filed December 6th, 1921. File No. 28592.

TESTIMONY OF A. E. CALDWELL

A. E. Caldwell, produced as a witness on behalf of plaintiffs, being first duly sworn testified as follows: I reside at Hollister, have lived there since the fall of 1910. Occupation, farming. I have had no experience in irrigating land except on the Salmon tract since the year 1911. I was on the South Side Twin Falls tract one season. I raised wheat, oats, barley, alfalfa and alsike on the Salmon. I used the corrugation method. I have had to double up the water allotted to me on some of my land in order to mature crops during the short seasons. I have left some of my land lie idle and put the water allotted to it on other lands. I have irrigated from 85 to about 450 acres in different seasons. I have approximately 370 acres in cultivation. I can measure water according to the rules and the table the Canal Company furnishes. From two to three acre feet is necessary to raise an average crop of grain on the Salmon tract, and from four to five for alfalfa. I haven't had much experience with red clover, it all died for I didn't have any water to save it with. The year that I had alsike we were short on water. I lost part of my crop on that account. I haven't had a chance to know just the required amount that I would use. The average time we would require water for irrigation on the Salmon would be from the first of April to about the first of November.

An action is pending in the District Court of Twin Falls County, the State Court, to compel the Canal Company and the Land & Water Company and the Trustees to deliver water to me this year at sixty cents per acre maintenance rather than $1.25 per acre, thereby eliminating the question of the check basin from the maintenance charge. I am the plaintiff in that action. I brought it on behalf of the settlers on the tract. I am a member and a director of the settlers' association and have been for some years, and I was president of that association some years ago. I am one of the plaintiffs in this suit. Mr. Ray Beauchamp, who testified here, is Secretary of that association. I think that suit was begun a week ago last Saturday, about the 15th of March. In that action I seek to have determined the question as to whether the check basin should be constructed at the expense of the construction company or whether it is a maintenance charge which may be made by the Canal Company. The action has not been tried. I think the citation is returnable and the hearing is to be had on the 28th of March before the District Court of Twin Falls County. The association was represented at a hearing before the Land Board on the fixing of this maintenance charge. I made the difference between two and three acre feet as the requirement for grain because there is quite a difference in our seasons. Some years we don't have but very little water and we get very dry in the fall, possibly too dry to fall plow and we lose what little moisture we put in the ground that year and the next year we have got to start all over. If it is too dry to do good fall plowing we get our crop in late and we require more water. Some years I have only been able to irrigate wheat once, some of them I would irrigate three times or more, depending on what I could get. As-

suming I had an ample supply of water, two to four irrigations would be required in an ordinary season for a good average crop, that depends on the season. The only time I need water in the ditch to irrigate my grain is the two or three times that I irrigate it. If I plant it late I have to irrigate it late. I would irrigate it on an average from the middle of May or the 20th of May until the 5th of August, somewhere along there. The time when wheat will be but depends a great deal on the time of seeding, and hot or cool weather makes a difference. I consider the last irrigation season while the wheat is in the doe. In cool weather it ripens much slower but it would be ready to cut approximately ten days or two weeks after that. I have different amounts of help in irrigating my farm. I have two boys that are with me most of the time, and usually from one to three hired men. I had 370 acres last season and a rented place. I had six irrigators including myself. They were irrigating continuously when the water was available. We used the water as long as it was available, all the water we could get, and then we didn't get all over that land. We didn't get over it all at one irrigation. The run was approximately twenty days. It would make 450 acres with 80 acres I had leased. There was times last year I knew what head of water I had—a great deal of the time I didn't. Part of the time they called it a double head, two second feet to the hundred acres. Sometimes there would be two or more of us working together with the same water. We didn't each man take a head of water and take it through the season. We would work together to suit conditions and suit the work. Sometimes we wouldn't have no water at one headgate while we would have a full head at another. I consider a foot and a half, from a foot to a foot and a half, or from 50 to 75 inches a good working head. A man can cover with a second foot possibly three acres in grain and somewhere between two and three acres in alfalfa. I never measured that out exactly. It takes more water and more time if you want to soak the ground down deep.